89-609

No. _____

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

vs.

NATIVE VILLAGE OF TYONEK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Native Village of Tyonek could exclude Petitioners from Tyonek, Alaska, on the basis of their race.

2. Whether the Native Village of Tyonek has tribal status which will justify or provide immunity for racially discriminatory village ordinances and rules.

3. Whether any vestige of tribal status of Native Village of Tyonek and tribal sovereign immunity flowing therefrom was extinguished by Congressional enactment of the Alaska Native Claims Settlement Act, 43 U.S.C. § 1601-1628.

4. Whether the constitutional and federal claims of Petitioners based on violation of the United States Constitution and Civil Rights Act, 42 U.S.C. § 1981, § 1982, § 1983 and § 1985, are barred by principles of tribal sovereign immunity.

5. Whether tribal sovereign immunity has been waived by the Native Village of Tyonek either by adoption of a consent to sue or be sued clause in the corporate charter or by bringing a complaint against Petitioners in federal court or by the Indian Civil Rights Act.

6. Whether individual village officers of the Native Village of Tyonek through intentional, malicious and unconstitutional conduct have deprived themselves of derivative immunity from Native Village of Tyonek.

PARTIES TO THE PROCEEDING

Counsel of record for Petitioners certify that the only persons who have an interest in the outcome of this case are all parties to the above-captioned matter. These representations are made to enable the Justices of the Court to evaluate possible disqualification or recusal.

1. The plaintiff is the Native Village of Tyonek. Its village council members are sued as third-party defendants and are identified as follows:

A. Donald Standifer

B. Bonnie McCord

C. Al Goozmer

D. Emil McCord, Sr.

2. The defendants named in the original action and asserting counterclaims are:

A. Donald Puckett

B. Erna Puckett

C. Fred Slawson

D. Virginia Slawson

3. Other named defendants sued by Native Village of Tyonek are:

A. Alexandria Kaloa

B. Esther Kaloa

C. Alec Constantine

D. Olga Constantine

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The Opinion of the Ninth Circuit United States Court of Appeals is an unpublished Opinion and is printed in Appendix A, *infra*, App. 1 - App. 5. The Judgment and Memorandum of Findings and Conclusions of the United States District Court, District of Alaska, is printed in Appendix B, *infra*, App. 6 - App. 36.

JURISDICTION

The Judgment of the Ninth Circuit United States Court of Appeals was entered on August 11, 1989. Jurisdiction of the Supreme Court is invoked pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 19.1.

CONSTITUTIONAL PROVISIONS, STATUTES AND ORDINANCES INVOLVED

Since the constitutional and statutory provisions involved are lengthy, the citations alone are set forth below. The pertinent text is set forth in Appendix C, App. 37 - App. 51.

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- 25 U.S.C. § 495, Annette Island is reserved for Metlakatla Indians.

Indian Civil Rights Act

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Civil Rights Act

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- 42 U.S.C. § 1983, civil action for deprivation of rights.

Fair Housing Act

- 42 U.S.C. § 3604, discrimination in sale or rental of housing.

Alaska Native Claims Settlement Act

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- 43 U.S.C. § 1607, Village corporations.
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- Federal Rule of Civil Procedure

- Rule 13, counterclaim and cross-claim.

STATEMENT OF CASE

This is a case about the decision of the Native Village of Tyonek ("NVT") to kick two families out of the village on the sole basis of their race. Tyonek is a "bush" Alaska village located approximately 43 air miles southwest of Anchorage, Alaska. Cr. 46. It is an isolated community, accessible only by air, located within the boundaries of the Kenai Peninsula Borough, State of Alaska. The village of Tyonek is not organized as a municipality under Alaska law. Cr. 46.

From approximately 1977 until 1981, Donald and Erna Puckett and their four children lived at Tyonek Timber Camp, located just outside the village of Tyonek. Cr. 99. The Puckett children attended the local Tyonek school, the R. L. Bartlett School, with other native and non-native children of the village of Tyonek. Cr. 63, Deposition of Erna Puckett. Donald Puckett worked as a millwright at the Tyonek Timber Camp until he was laid off in October 1981. *Id.* During this time, Erna Puckett worked as a substitute teacher and a cook at Bartlett School in Tyonek. *Id.*

In 1981-82 school year, Erna was hired as a secretary to the high school principal. *Id.* Since the Timber Camp

was closing down, the Pucketts requested and received permission from the Village Council to reside in the village for the 1981-82 school year. However, after the Pucketts rented and moved into the Kaloas' house in Tyonek, a petition drive was started by Bonnie McCord, a Village Council member, to gain support to have the Pucketts excluded from the village of Tyonek. Cr. 50.

During this same time period, in December 1981, Fred and Virginia Slawson sought permission to live in and rent the Constantine house in Tyonek. Unlike the Pucketts, Fred Slawson was a shareholder of Tyonek Native Corporation and Cook Inlet Region Inc. Native Corporation, having been previously married to a native resident of Tyonek. Moreover, Fred Slawson had children from that marriage living in Tyonek. However, as a result of the mounting passion to exclude the Pucketts, the Slawsons too were victims of the surge of xenophobia and were denied permission to live in Tyonek by the Village Council.

The NVT Village Council's basis for excluding and evicting the Pucketts and Slawsons was Village Ordinance 65-32 and Village Rule No. 4, which purported to give the NVT authority to exclude non-members from Tyonek housing and "whites" from Tyonek.

Village Rule No. 4:

> Any white man except government or outsider coming in is allow to stay only 24 hours. [sic] If weather permits them to go. And is not allowed to bring any liquor. Article No. 4 have to be put up in posters. And anyone destroying these papers will be subject to penalty. $25.00 fine if caught destroying the poster. [sic]

Rules for Laws, of the Native Village of Tyonek (May 18, 1942).

When the president of NVT's Village Council was questioned specifically on the reasons behind the Village Council's decision to exclude the Pucketts and the Slawsons, the only justification given was their race:

> Q. And the Pucketts and Slawsons are being asked to leave because they are white; is that not true?
>
> A. That's correct.
>
> Q. Have they done anything else, have they violated any ordinances or done anything to any of the other villagers?
>
> A. They are violating Ordinance 65-32 and also the rule of the government.
>
> Q. Which relates to whites living in the village?
>
> A. That's correct.
>
> Q. Apart from these ordinances, or rules or regulations relating to whites living in the village, have they violated any other ordinance or rule of the village?
>
> A. Not that I am aware of.
>
> Q. Have they done anything else to adversely affect the village, apart from being white?
>
> A. No. Not – with the exception of violation of 65-32 and also the rules of the government.
>
> Q. Which relates to whites living in the village?
>
> A. Yeah. Right.

Cr. 63, Standifer Deposition.

In the effort to exclude the Pucketts and the Slawsons from Tyonek, NVT filed its lawsuit in federal court against the Pucketts and Slawsons to exclude them as white families and against the Kaloas and Constantines to prevent their renting to the Pucketts and Slawsons.

Q. As I understand it, the – or I infer from what you are saying, the Village Council no longer approves any rentals by native families, such as the Constantines and the Kaloas, to whites; is that correct?

A. That's correct.

Q. It doesn't matter whether the Slawsons or the Pucketts, it's any white families, is that correct?

A. That's the way it's always been, and that's the way it will continue to be. I might add one thing. I might be going overboard here, but I'd like to clarify. I know we're hitting on whites. If they were black, it would be the same situation. The white was put in our rules for government back in the '40s, there were no black people around here, the people – everybody who came around were whites, so we just called them white so –

Q. It could be for whites, blacks, orientals?

A. Right.

Cr. 63, Standifer Deposition.

The reason NVT wishes to exclude the Pucketts and Slawsons from the village of Tyonek is admittedly one of maintaining racial purity. Cr. 50. The campaign of harassment, the petition drives, the vandalism and the lawsuit were all effective tools in achieving this goal. Life in an isolated community is hard. The difficulty of bush life

stems from extreme weather conditions faced in Alaska plus the psychological pressures of isolation. In this kind of environment, individuals need a sense of belonging in a community to survive. Instead, the Pucketts and Slawsons experienced threatening phone calls, and their houses were repeatedly broken into and vandalized.

The Pucketts and Slawsons faced increasing impediments to living in Tyonek. Once they were identified by the Village Council of NVT as pariahs, it was only a matter of time before the Pucketts and Slawsons were forced to abandon their desire to live and work in the village of Tyonek. The Pucketts had friends in Tyonek, and Mr. Slawson had a child from a previous marriage living in Tyonek. The Pucketts' children wanted to graduate with their native and non-native friends at Tyonek's Bartlett School.

In response to NVT's complaint for eviction, the Pucketts and Slawsons filed counterclaims against NVT and a third-party complaint against four officers of the IRA Village Council for damages. The Puckett and Slawson counterclaims invoked federal jurisdiction pursuant to 28 U.S.C. § 1343, 28 U.S.C. § 1331, 42 U.S.C. § 3612, 28 U.S.C. § 2201. They alleged both private and intentional acts of discrimination committed by NVT and its Village Council officers in violation of 42 U.S.C. § 1981, as well as private racial discrimination in the sale or rental of property in violation of 42 U.S.C. § 1982 and the Fair Housing Act, 42 U.S.C. § 3604 and § 3617. The counterclaim also alleged violation of the First and Fourteenth Amendments of the United States Constitution in violation of the Civil Rights Act of 1871 (42 U.S.C. § 1983 and § 1985). The counterclaim also alleged various state

tort causes of action as well as violation of state discrimination in housing laws and violation of the Indian Civil Rights Act, 25 U.S.C. § 1302(a).

Upon cross motions for summary judgment, the federal district court dismissed the NVT complaint for lack of subject matter jurisdiction and the counterclaims and third-party claims of the Pucketts and the Slawsons on the basis of NVT's tribal immunity. The court concluded that NVT's history and the manner in which the federal government had dealt with Tyonek entitled NVT to sovereign immunity from suit. *See,* Appendix B.

On December 22, 1986, final judgment based on the findings and conclusions of the court was entered dismissing all claims and counterclaims. *See,* Appendix B. On January 19, 1987, the Pucketts and Slawsons filed a timely notice of appeal of the dismissal of their counterclaims and third-party claims. (Doc. No. 87-3569.) Cross-appeals were subsequently filed by NVT and co-defendant native landlords Kaloas and Constantines. (Doc. Nos. 87-3587 and 87-3588.)

On August 11, 1989, the United States Court of Appeals for the Ninth Circuit entered an unpublished Memorandum decision reversing the district court's dismissal of NVT's complaint for lack of subject matter jurisdiction. In a terse one-line statement, the court affirmed the dismissal of the counterclaims and third-party claims of the Pucketts and Slawsons.

On August 26, 1989 co-defendants Kaloas and Constantines filed a petition for rehearing on the question of

subject matter jurisdiction of NVT's complaint. This petition for rehearing was filed only in the Kaloa and Constantine/NVT appeals (Docket Nos. 87-3587 and 87-3588). These appeals were not consolidated and were treated separately by the Ninth Circuit as not bearing on the affirmance of the Puckett and Slawson appeal. (Doc. No. 87-3569.) Therefore, jurisdiction lies with this Court pursuant to 28 U.S.C. § 1254(1) and Supreme Court Rule 17.1.

REASONS FOR GRANTING THE WRIT

I. THE NINTH CIRCUIT DECISION GRANTING TRIBAL SOVEREIGN IMMUNITY TO NVT IS IN CONFLICT WITH AN ALASKA SUPREME COURT DECISION DENYING TRIBAL SOVEREIGN IMMUNITY TO A NATIVE ALASKAN VILLAGE.

A. The Status of Native Villages in Alaska As Tribal Entities Is Still An Open Question.

In *Native Village of Stevens v. AMP*, 757 P.2d 32 (Alaska 1988), the Alaska Supreme Court concluded that Alaska native villages similar to NVT are not entitled to tribal sovereign status:

> Stevens village does not have sovereign immunity because it, like most native groups in Alaska, is not self-governing or in any meaningful sense sovereign. . . . [Cites omitted.] [T]he history of the relationship between the federal government and Alaska Natives up to the passage of the Alaska Indian Reorganization Act, 49 stat. 1250 (1936) indicates that Congress intended that most Alaska Native groups not be treated as sovereigns. Finally, neither the Alaska

> Indian Reorganization Act, nor subsequent Congressional acts have signaled a change from non-sovereign to sovereign status.

Id., at p. 34. Even the dissenting opinion in *Native Village of Stevens, supra,* noted that Congress has steadfastly avoided any attempt to find the extent and limits of native sovereignty in Alaska. *Id.*, at 49. The dissenting justice cited to the most recent "1991" Amendments to the Alaska Native Claims Settlement Act ("ANCSA"), wherein Congress declared that it sought neither to "confer on, or deny to, any native organization and any degree of sovereign governmental authority over lands . . . or persons in Alaska." Alaska Native Claims Settlement Act of 1987, Pub.L. No. 100-241, § 2(a)(B), 101 stat. 1788, 1789 (1988). *Id.* The dissenting justice opined that Congress had simply abdicated to the courts this critical issue of defining the extent and limits of tribal sovereignty held by Alaska native villages. *Id.*, at 50.

Similarly, the Ninth Circuit has long wrestled with the uncertain and difficult issue of tribal status of native Alaskan villages. *See, State of Alaska v. Native Village of Venetie,* 856 F.2d 1384 (9th Cir. 1988).[1] The court noted

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[1] Other recent Ninth Circuit and Alaska cases which have wrestled with tribal sovereignty of Alaska native villages are: *Native Village of Noatak v. Hoffman,* 872 F.2d 1384 (9th Cir. 1989); *Native Village of Venetie IRA Council v. State of Alaska,* 687 F.Supp. 1380 (D.Alaska 1988); *In the Matter of 1981, 1982, 1983, 1984 and 1985 Delinquent Property Taxes Owed to the City of Nome Alaska,* ___ P.2d ___ (publication pending) (Alaska Sept. 22, 1989).

that recognition of many Alaska native villages as IRA organizations was not conclusive evidence of tribal status. *Id.*, at 1387, *citing, Price v. State of Hawaii*, 764 F.2d 623 (9th Cir. 1985), *cert. denied*, 474 U.S. 1055 (1986). The court cited argument that "[T]he language of the IRA's Alaska Amendment (cite omitted) raises doubt as to whether IRA organization should be construed so conclusively in the case of Alaska Natives." *Id.*, at 1387.

The writ should be granted in order for the United States Supreme Court to resolve this lingering and festering issue over the tribal status of Alaska native village governments and the extent to which IRA village councils can claim tribal sovereign immunity.

B. NVT Has Never Been Recognized As A Tribe By A Federal Government Agency.

As the court directed in *State of Alaska v. Native Village of Venetie, supra*, at 1387, if organization under the IRA does not settle the question, one next looks to whether the federal government has otherwise recognized the tribal status of the village. As noted by the Alaska Supreme Court in *Native Village of Stevens, supra*, neither Congress nor the Executive Branch has singled out or granted sovereign status to native villages in Alaska. Although NVT asserts it is a "federally recognized Indian tribe" and brings suit to exclude non-members from the village of Tyonek, this assertion is unsupported by the record.

The United States Department of the Interior has repeatedly failed to recognize Alaska villages as tribes.

The department has listed Alaska Native Villages, including Tyonek, as "entities" and not as "tribes." 47 Fed.Reg. 53133-135 (1982). Thus, the Executive Branch has refused to denominate Tyonek as a "tribe."

A careful review of the cases raised by NVT to establish its tribal status reveals no specific recognition of NVT as a tribe. In *Fondahn v. Native Village of Tyonek*, 450 F.2d 520 (9th Cir. 1971), an action was brought seeking enforcement of a constructive trust on revenues obtained from lease of oil and gas reserves. In *Fondahn*, it was alleged by the plaintiff, who was a village resident of Tyonek, that the NVT was a tribe. Therefore, the issue was conceded by the plaintiff and was not in dispute.

Similarly, in *Olestead v. Native Village of Tyonek*, 560 P.2d 31 (Alaska 1977), the Alaska Supreme Court refused to intrude on a determination of tribal membership. Again, the plaintiff to the action had conceded the tribal status of NVT and wanted a judicial determination of her participation as a member. The Alaska court merely refrained from resolving such a dispute. However, this is not a judicial recognition of NVT's tribal status.

Finally, in *United States v. Booth*, 161 F.Supp. 269 (D.Alaska 1958), the court held that the Metlakatla reservation was not Indian country, and went on to note the historical differences in federal policy toward the Alaska native population and non-native Alaskan populations. As noted in all early federal cases on the subject, the villages of native Alaskan peoples were not considered to be Indian country. *See, United States v. Seveloff*, 1 Alaska Fed. 64, 2 Sawy. 311 (D.C. Oregon 1872); *Walters v. Campbell*, 1 Alaska Fed. 91, 5 Sawy. 17 (D.C. Oregon 1876); *Kie*

v. United States, 27 Fed. 351, 1 Alaska Fed. 125 (1892); and *In re Sau Quah*, 31 Fed. 327, 1 Alaska Fed. 136 (1886).[2]

C. Historical Factors Do Not Support A Finding of Tribal Status.

Failing to find specific federal government recognition, the next level of inquiry is "careful scrutiny of various historical factors." *State of Alaska v. Venetie, supra*, at 1387. A decidedly different relationship and history of experience has always existed between the federal government and Alaska natives. The distinct nature of this relationship has been previously noted by the U.S. Supreme Court. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962), Justice Frankfurter described these differences as follows:

> The Indians of southeastern Alaska, who have very substantially adopted and been adopted by white men's civilization, were never in the hostile and isolated position of many tribes in the other states. As early as 1886, a federal judge, holding Alaska Indians subject to the Thirteenth Amendment, denied that the principle of Indian National Sovereignty enunciated in *Worcester v. Georgia*, 8 L.Ed. 483, applied to them. There were not Indian wars in Alaska, although on at least

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[2] The only exception is *In re Petition of McCord*, 151 F.Supp. 132 (D.Alaska 1957), in which the court granted a writ of *habeas corpus* on the theory that federal criminal statutes did not extend jurisdiction over alleged acts of a defendant in Tyonek. However, the court decision did not recognize Tyonek as a "tribe" but only as "Indian country" for the sole purpose of whether there was territorial criminal jurisdiction. This factually distinct case is not precedent for the tribal status of NVT.

> one occasion there were fears of an uprising. There was never an attempt in Alaska to isolate Indians on reservations. Very few were ever created, and the purpose of these, in contrast to many other states, was not to confine the Indians for the protection of white settlers, but to safeguard the Indians against exploitation. Alaska Indians are now voting citizens, some of whom occupy prominent public office in state government.

Id., at 50-51.

The Supreme Court of Alaska, in *Atkinson v. Haldane*, 569 P.2d 151 (Alaska 1977), also observed the difference in treatment of Alaska native peoples from Indians in other states. The court noted these distinctions began because Alaska natives were initially under Russian rule. The court also remarked on the seemingly limitless physical resources of the territory of Alaska, which minimized displacement of Alaska natives by the white civilization. These differences partially explain the lack of reservations in the State of Alaska.

Finally, the Alaska court noted in *Atkinson v. Haldane*, that:

> [E]ven though the purchase of the [Alaska] territory occurred in 1867, four years before the termination of the Senate's power to ratify treaties with the Indians, the government never attempted to enter into any treaties with the Alaska natives.

Id., at 155, *citing*, Cohen, *Handbook of Federal Indian Law*, 405 (1942) (2d printing, University of New Mexico). The court also cited this treatise for the proposition that:

> The Native villages and communities of Alaska were not organized on 'tribal lines,' and the

> village rather than the ethnological tribe has been the central unit of organization.

Id., at p. 155, n.12, *citing*, Cohen, *supra*, at n.9 at 414 and n.208. The history of Alaska native self government has generally been the "village" system as opposed to the "tribal" system. *See generally*, Hipler and Cohen, "The Village Council and Its Offspring: A Reform of Bush Justice," 5 UCLA – Alaska Law R. 22 (1975).

This village system of government has been recreated by Alaska natives as subgroups or combinations of larger ethnic groups, *i.e.*, Inupiat, Aleut, Athabascan or Tlingit peoples combining into one village council. In many instances, these village councils or IRA organizations exist within contiguous geographic locations of incorporated Alaska municipalities. Examples can be found in numerous Alaska municipalities such as (1) Sitka, Alaska and the Native Sitka Community Association, (2) Cordova, Alaska and the Native Village of Eyak, and (3) Ketchikan Indian Corporation, which is organized under both the IRA §§ 16 and 17, yet has members who "are not descended from any particular Indian community, but are natives of different groups who happen to live in Ketchikan," *Board of Equalization v. Alaska Native Bhd. and Sisterhood*, No. 14, 666 P.2d 1015, 1025 (Alaska 1983).

Similarly, in NVT's own constitution and by-laws it is stipulated that a person can be a member of NVT's "tribe" by either being born to a member of the tribe or by seeking admission if one is at least one-quarter native Alaskan, whether he or she is Athabascan, Eskimo or Aleut. Cr. 63, Standifer Deposition. In other words the tribal parameters of NVT are actually quite broad and will admit any one-quarter Athabascan Indian from

Anchorage or one-quarter Aleut from the Alaska chain or one-quarter Eskimo from Western Alaskan or one-quarter Tlingit from the islands around Juneau. This would be similar to a tribal entity formed in a village in the State of Nebraska which admitted a one-quarter Iroquois from the East, with a one-quarter Cherokee from the South, a one-quarter Sioux from the Plains and a one-quarter Apache from the Southwest, each of whom has no other claim to tribal membership other than being American Indian.

NVT's argument that it needs to exclude the Pucketts and Slawsons to preserve and maintain tribal character and identity is specious in the face of such broad parameters of "tribal" membership. NVT's attempt to preserve its racial and cultural purity is futile where its own definition of a tribal member includes a mixture of all native persons in the State of Alaska. In other words the ethnic purity and tribal control NVT seeks to confirm by excluding the Pucketts and Slawsons was long ago destroyed, if in fact it ever existed, by its own liberal rules of admission of all Alaska natives.

There is some general historical authority, as cited by the court below, to demonstrate that Tyonek once existed as a Russian trading settlement in the late 18th Century. This village was subsequently destroyed. Although Indians were observed by Captain Cook, as noted by the court below, in the Cook Inlet region, this "region" is vast and includes the present location of Anchorage, Alaska, the largest city in the State of Alaska. As fully discussed by the Alaska Supreme Court in *Native Village of Stevens v. AMP, supra,* recognition of NVT as an Alaska IRA village provides no confirmation of tribal status.

Finally, the withdrawal of lands in the Moqwakie Reserve in 1915 by President Woodrow Wilson was merely a withdrawal of land to the BIA for benefit of Alaska natives generally in the Cook Inlet/Tyonek region with no reference to a specific tribal community. Thus, it was not until 1939, when NVT adopted a constitution and by-laws pursuant to the Indian Reorganization Act, that NVT first existed as a local entity. There are no facts in the record to support a finding that these people were indigenous to the area of the village of Tyonek and that they were governed by laws and customs of the Athabascan people. There is only evidence that it was a Russian trading settlement. As discussed, *infra*, with the passage of the Alaska Native Claims Settlement Act, the Executive Order creating the Moqwakie reservation in which the village of Tyonek is situated was revoked along with all other native reservations or withdrawals in the State of Alaska. 43 U.S.C. § 1618 (ANCSA).

II. ANY TRIBAL OR INDIAN COUNTRY STATUS OF NVT WAS EXTINGUISHED BY CONGRESSIONAL ENACTMENT OF THE ALASKA NATIVE CLAIMS SETTLEMENT ACT.

The court below erroneously failed to consider the Pucketts' and Slawsons' claim that Congressional enactment of the Alaska Native Claims Settlement Act ("ANCSA") extinguished NVT's tribal status and, thereby divested NVT of immunity from suit. The court below justified its failure to address this issue by stating the Pucketts and the Slawsons did not assert the argument.

This is incorrect. In their affirmative defenses to the complaint, in their counterclaim and in their motion for summary judgment and order to strike the immunity defenses of NVT, the Petitioners repeatedly argued that the natural and necessary effect of enactment of ANCSA was to extinguish any claim of immunity by NVT. Cr. 39 and Cr. 57.

Under § 19 of ANCSA, 43 U.S.C. § 1618, Congress revoked all native reservations or withdrawals in the State of Alaska, including Executive Order No. 2141, which created the Moqwakie Reservation. Pursuant to § 8 of ANCSA, 43 U.S.C. § 1607, native residents of each village and for each city in the State of Alaska could establish a native "for profit" corporation through which they would receive land and other benefits under ANCSA. Shortly after passage of ANCSA, the residents of the Village of Tyonek formed the "for profit" Tyonek Native Corporation. This corporation received all lands in the village and all lands formerly surrounding and making part of the Village of Tyonek.

In enacting ANCSA, Congress resolved all Alaska native claims and stated this was done " . . . without establishing any permanent racially defined institution, rights, privileges or obligations, creating a reservation system or lengthy wardship or trusteeship." 43 U.S.C. § 1601(b). Congress determined that a special wardship relationship between the federal government and Indian populations in the State of Alaska would not continue. The intent of Congress was to eliminate the reservation form of native land holding and to erect in its place a corporate model of native ownership of land. These native corporations were to be organized pursuant to

state law and would administer and preserve native Alaskan wealth. The native residents of Tyonek are all shareholders in a native corporation, the Tyonek Native Corporation. This corporation owns the land on which the Kaloa and Constantine houses sit. The houses are owned by the Kaloas and Constantines. NVT enjoys no ownership interest in the land or in the houses but seeks to assert its tribal powers to exclude the Pucketts and Slawsons. As one Village Council member of NVT put it: "When you quit exercising the power you lose it." Cr. 50.

The Pucketts and Slawsons submit that the result of such a congressionally mandated system results in the loss of "tribal" autonomy over what might previously have been argued was "tribal" land. The NVT council cannot exclude people from a "reserve" that does not exist. This new legal framework set up by Congress is inconsistent with any notion that NVT or the village of Tyonek can exercise control over the land or retain indicia of sovereignty over land it doesn't own.

By its terms, ANCSA created state "for profit" native corporations to hold NVT's land. These state corporations became subject to state jurisdiction. Consequently, the land selected by the "for profit" native corporation cannot be termed either tribal land or Indian country subject to restraint in alienation.

This corporate approach to the problem of legal status of Alaska natives pursuant to ANCSA represented a bold and innovative departure from past Congressional treatment of Native Americans. The corporate model of organization was adopted along with the concept of free alienability of the selected land following a relatively

brief holding period. NVT and its Village Council are in the anomalous position of asserting legal status and immunity based on some theory of dependent status when it is Tyonek's native corporation which holds the power, the land and the future direction of native Indian wealth in the State of Alaska. The benefit to be obtained from an economically viable corporation with the ability to preserve and increase the wealth of individual native residents was perceived by Congress to be of greater benefit than any tribal right to erect a racially pure barrier around the village of Tyonek. Although the Tyonek Village Council officers may wish to disagree, it was a fair bargain.

III. CLAIMS GROUNDED IN THE UNITED STATES CONSTITUTION AND CIVIL RIGHTS ACT §§ 1981, 1982, 1983 AND 1985 PROTECTING BASIC FREEDOMS OF ALL CITIZENS SHOULD NOT BE BARRED BY PRINCIPLES OF TRIBAL IMMUNITY.

The Court should examine the continued vitality of the doctrine of tribal sovereign immunity as it was enunciated in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506 (1940).[3] Such immunity should not extend to conduct outside internal tribal affairs.

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[3] In *Colliflower v. Garland*, 342 F.2d 369 (9th Cir. 1965), the court acknowledged treatise authority for the proposition that the U.S. Constitution did not apply to Indians in the conduct of tribal affairs. However, the court called into question the "present validity of this proposition, as so broadly stated. . . ." *Id.*, at 377.

Tribal authority over regulation of the activities of non-Indians is not absolute. The United States Supreme Court has applied two tests to determine the limit and extent of tribal authority over the conduct of non-Indians. *Tribes and Bands of the Yakima Indian Nation v. Whiteside*, 828 F.2d 529, 533 (9th Cir. 1987). The test, as applied in *Washington v. Confederated Tribes of the Colville Indian Reservation*, 447 U.S. 134 (1980), is one where tribal sovereignty is divested only when its exercise is inconsistent with the overriding federal interests. *Id.*, at 533. The United States Supreme Court in *Montana v. United States*, 450 U.S. 544 (1981), recognized that, by virtue of the dependent status of Indian tribes, sovereignty to regulate relations between the tribes and non-members is implicitly divested. *Id.*, at 533. In *Montana v. United States*, the Court held that "the exercise of tribal power beyond what is necessary to protect tribal self government or to control internal relations is inconsistent with the dependent status of tribes, and so cannot survive without express Congressional delegation." *Id.*, 50 U.S. at 564. This exception to the inherent tribal regulatory authority is strictly limited to non-member conduct which "threatens or has some direct effect on the political integrity, the economic security or the health and welfare of the tribe." *Id.*, at 566.

There is no threat to "tribal interest" of NVT or its Village Officers created by the presence of the Pucketts and Slawsons in Tyonek. There is no just reason for the viability of tribal immunity for the intentional racial discrimination practiced by NVT. It is undisputed that Petitioners had no ability to obtain control of tribal government or dilute tribal culture in Tyonek more than such dilution has already occurred. The exclusion of the

Pucketts from Tyonek is ludicrous when the Tyonek public school is staffed by resident, non-native families.

Moreover, NVT has realized monies in excess of $12 million from oil and gas leases. These proceeds have been used by NVT to buy commercial buildings in Anchorage, an electric power plant and prefabricated housing for the Tyonek village. Native residents are shareholders in the Tyonek Native Corporation and Cook Inlet Region Native Corporation with holdings in Anchorage and throughout the state. The presence or non-presence of Donald and Erna Puckett and their four children in the village of Tyonek has very little significance in comparison to the major inroads created by native investment in the commerce of the State of Alaska and the American system of capitalism.

Where the acts of NVT are totally inimical to the laws and Constitution of the United States, and those acts are not only unauthorized by any Congressional scheme but are specifically forbidden as racially discriminatory acts, vestiges of tribal sovereign immunity should not be erected to bar the Petitioners' claims. Such conduct cannot be construed as authority delegated to NVT by Congress.

Private causes of action under §§ 1981, 1982, 1983 and 1985 of the Civil Rights Act need no theory of "color of law," tribal or federal, to establish federal jurisdiction. These intentional discriminatory actions of NVT and its Village Council members are distinguishable from the exercise of tribal sovereignty over mineral severance taxes as approved by this Court in *Merrion v. Jicarilla*, 455 U.S. 130 (1982).

Petitioners request this Court to re-examine the vitality of NVT's right to tribal recognition and cultural autonomy to justify a grant of sovereign immunity from suit for intentional and admittedly racial discriminatory practices. To say that NVT is immune from U. S. Constitutional principles would logically mean that NVT could have placed the Pucketts in a slave labor camp for their refusal to leave Tyonek and that such misconduct would be exercised by NVT with impunity, disregarding federal law, equal protection under the laws and the U.S. Constitution. Such a broad statement of tribal immunity cannot be upheld.

IV. ANY SOVEREIGN IMMUNITY HELD BY NVT WAS WAIVED BY NVT'S ACTIONS, ITS ADOPTION OF SUE-OR-BE-SUED CLAUSES OR BY CONGRESSIONAL ENACTMENT.

A. Summary of Waiver Argument.

The Pucketts and Slawsons raised three arguments to the federal court below for finding a waiver of sovereign immunity by NVT: (1) adoption of a corporate charter pursuant to the IRA, which provided that NVT expressly consented to being sued, (2) commencement of an eviction action in the federal court against the Pucketts and Slawsons which subjected NVT to the jurisdiction of the federal court for all compulsory counterclaims arising out of that action; and (3) enactment by Congress of the Indian Civil Rights Act, which has divested NVT of sovereign immunity for intentional violation of the rights enunciated under that Act.

B. NVT Has Expressly Consented To Being Sued In Adopting a Corporate Charter.

In the instant case, NVT acknowledges that it adopted a constitution and by-laws under § 16 of the IRA and a corporate charter sets forth its power. The corporate charter was adopted pursuant to § 17 of the IRA. One of the powers enunciated and adopted by NVT was the power to "sue and be sued." With this adoption, NVT has waived sovereign immunity from suit.

The courts have consistently held that a tribe's adoption of a charter which contained a "sue and be sued" clause was a consent and waiver of any tribal immunity. *See, Fontenelle v. Omaha Tribe of Nebraska,* 430 F.2d 143 (8th Cir. 1970) and *Parker Drilling Co. v. Metlakatla Indian Community,* 451 F.Supp. 1127 (D.Alaska 1978).

The court below attempted to draw a distinction that NVT's waiver of sovereign immunity was solely for actions taken in its corporate capacity under § 17 of the IRA but that NVT retained immunity for actions taken in its governmental capacity under § 16. This is a distinction without a difference. It is undisputed that NVT sued Petitioners under its § 17 powers to sue and evict the white families from town. Even if the decision to keep Tyonek racially pure was an act of NVT in its governmental capacity under § 16, this governmental "policy decision," if it can be so described, was implemented through NVT's power to sue. In taking that action, NVT expressly consented to being counter-sued under Rule 13(a), Federal Rules of Civil Procedure.

C. Rule 13(a) Of The Federal Rules Of Civil Procedure Requires The Assertion Of Counterclaims Which Arise Out Of The Same Transaction Or Occurrence Which Is The Subject Matter Of The Opposing Party's Claim.

The Ninth Circuit has held that a tribe may waive its sovereign immunity by agreeing to provide for resolution of an issue by federal courts. *See, United States v. Oregon,* 657 F.2d 1009 (9th Cir. 1981). NVT sought to evict the Pucketts and Slawsons through a lawsuit filed in federal district court. NVT submitted itself to the jurisdiction of the court in order to obtain the court's assistance in this racially motivated eviction. Thus, NVT waived any claim of sovereign immunity when it chose to bring legal action against these families to enforce its racially discriminatory ordinances. In *Jicarilla Apache Tribe v. Andrus,* 687 F.2d 1324 (10th Cir. 1982), the 10th Circuit recognized the principle of "equitable recoupment" while denying defendant's counterclaims. *Id.,* at 1344-45. Unlike the defendants in *Jicarilla,* however, defendants here are unquestionably asserting counterclaims which "arise out of the same transaction or occurrence as the initial cause of action."

D. The Congressional Enactment of the Indian Civil Rights Act Constitutes A Waiver of Sovereign Immunity Under The Facts In This Case.

Even assuming some vestige of tribal status, NVT's immunity will not be effective if it has been divested by Congress or lost by implication. *United States v. Wheeler,* 435 U.S. 313, 322-26 (1978). In *Dry Creek Lodge, Inc. v. Arapaho-Shoshone Tribe,* 623 F.2d 682 (10th Cir. 1982), *cert. denied,* 449 U.S. 1118 (1981), the 10th Circuit found that

authority existed under the Indian Civil Rights Act, 25 U.S.C. § 1301 *et seq.*, to enjoin tribal action which would deprive non-Indians of access to their land within reservation boundaries. The court held that where a dispute is between members and non-members (as opposed to a strictly internal tribal matter) and where there is "no remedy within the tribal machinery nor with tribal officials in whose election they cannot participate," a remedy will lie under the Indian Civil Rights Act. *Id.*, at 685. In the case at bar, there is no tribal machinery for relief to which the Pucketts or Slawsons could turn. Their sole protection is that afforded by federal statute, federal common law or the U.S. Constitution. The district court below, citing to *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978), erroneously interpreted the *Dry Creek Lodge* decision as a "narrow exception" to the general bar of sovereign immunity to suit held by tribal entities.

The case of *Santa Clara Pueblo, supra,* is distinguishable in that it involved a lawsuit by a tribal member against her tribe over internal tribal customs and procedures as applied to her. It is unreasonable to give an expansive reading to the immunity found to exist in *Santa Clara Pueblo* in the case at bar. In the instant case there is no unwarranted intrusion into the internal workings of tribal politics. The immunity identified by the Court in *Santa Clara Pueblo* should not preclude lawsuits by non-members against an Indian entity for alleged intentional violation of Constitutional guarantees and federal laws. This circumscription of tribal immunity would not unduly expand the scope of lawsuits against tribes. Moreover, if tribes and individual officers and leaders of tribes are trampling on the constitutionally protected rights of

their fellow citizens, then the scope of lawsuits against them should expand.

V. NVT OFFICERS ACTED VINDICTIVELY AND UNCONSTITUTIONALLY AND SHOULD NOT ENJOY BENEFITS OF DERIVATIVE IMMUNITY.

The district court below gave short shrift to the Petitioners' claims against third-party defendants, individual officers of the NVT Village Council. The court below erroneously found that these officers enjoyed derivative immunity from suit for their intentional and admitted racial discriminatory actions.

In *Chemehevi Indian Tribe v. Cal. State Bd. of Equalization*, 757 F.2d 1047 (9th Cir. 1985), the court discussed the parameters of derivative tribal sovereign immunity. The court stated that tribal officers who:

> . . . exceeded the authority granted by the sovereign, as when an officer has acted unconstitutionally, *the suit is deemed to be against the officer in his or her individual capacity*. Because this suit is not against the sovereign, it is not barred. (Cites omitted.) (Emphasis added.)

Id., at 1051. Once individual Village Council officers of NVT embarked on a course of action to exclude the Petitioners because of their race, they exceeded the permissible scope of their authority as NVT officers. Their actions fomenting discord and hate leave them subject to suit for violation of the Civil Rights Act, §§ 1981, 1982 and 1985, and for state causes of action grounded in tort.

In the instant case, the court below relied in some part on the fact that the houses in which the Pucketts and

Slawsons resided were purchased and built with royalty monies received by NVT on oil lease sales. In simple terms, since NVT paid for these houses, the court assumed that NVT could place conditions or covenants on their alienation.

The court below misconstrued the purposes of 25 U.S.C. § 398(b) in arriving at this erroneous statement of the law. The Petitioners submit that it is not logical for NVT to restrict alienation of houses to non-members merely because proceeds of the oil lease sales are held in trust. The monies are held in trust by the United States "for the use and benefit of such Indians. . . ." 25 U.S.C. § 398(b). This trust relationship does not provide NVT with statutory authority to discriminate in the use of these monies.

Second, it does not logically follow, as the court below inferred, that the Tyonek Family Plan and its restriction on rental to non-members would in any way benefit individual members of NVT. To the contrary, the Kaloas and Constantines have aggressively fought against such a "benefit." The court below merely rubber-stamped the NVT's action and assumed that a racially biased restriction in the Tyonek Family Plan for the sale of houses was for the "use and benefit of such Indians" merely because NVT says it was. Instead, the monies held in trust by the United States for the use and benefit of the Kaloas and Constantines have been improperly restricted by NVT, against the mandate of 25 U.S.C. § 398.

Finally, the court's reasoning would necessarily lead to an illogical result. NVT also purchased an Anchorage

commercial office building with the same oil lease proceeds which were used to purchase houses in the village of Tyonek. Under the court's logic, in the name of "benefiting" its members, NVT could limit and restrict leases of the Anchorage commercial office space on racial grounds. This tortured construction of 25 U.S.C. § 398 cannot be the law and the court below cited no authority for its reasoning on this point.

VI. CONCLUSION

The Village Council officers of Tyonek instigated and incited an atmosphere of hate and fear. Instead of building bridges between societies, the Village Officers of NVT embarked on a course of action which fostered racial discrimination and disharmony. In spite of this attempt to drive a wedge between peoples, Donald and Erna Puckett wanted to continue to live in Tyonek, and their son wished to graduate with his village friends at Bartlett High School. He has also, in the intervening years, married an Alaska native. Conversely, NVT's campaign to preserve racial purity in the village will have a poisonous effect on the native children of Tyonek. Children can have cultural pride without being taught that such pride equates to or springs from racial hatred or the preservation of racial purity and the separation of peoples.

The Pucketts and Slawsons submit that NVT and its Village Officers do not have the power to exclude them from Tyonek, Alaska, merely because of their color. Such blatant racial discrimination subjects NVT and its Village

Officers to claims for damages for unlawful acts committed to deny association, employment and housing on the basis of race.

RESPECTFULLY SUBMITTED this 10th day of October 1989.

JERMAIN, DUNNAGAN & OWENS, P.C.

RANDALL G. SIMPSON
Of Attorneys for Petitioners
Donald and Erna Puckett

ASHBURN & MASON

JULIAN L. MASON
Of Attorneys for Petitioners
Fred and Virginia Slawson

APPENDIX A

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF TYONEK Plaintiff-Appellee v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, Defendants-Appellants.	No. 87-3569 D.C. No. CV-82-369
NATIVE VILLAGE OF TYONEK, Plaintiff-Appellant, v. DONALD PUCKETT; ERNA PUCKETT; ALEXANDER KALOA; ESTER KALOA; FRED SLAWSON; VIRGINIA SLAWSON; ALEC CONSTANTINE; OLGA CONSTANTINE, Defendants-Appellees.	MEMORANDUM* (Filed Aug 11, 1989) No. 87-3587

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

NATIVE VILLAGE OF TYONEK, Plaintiff-Appellee, v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, Defendants, and ALEXANDER KALOA; ESTHER KALOA; ALEC CONSTANTINE; OLGA CONSTANTINE, Defendants-Appellants.	)	No. 87-3588

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and submitted January 5, 1988
Submission vacated November 28, 1988
and resubmitted August 8, 1989
Seattle, Washington

Before: WRIGHT, ALARCON, and POOLE, Circuit Judges.

The Native Village of Tyonek (Village) instituted this action seeking to evict non-members Donald and Erna Puckett (Pucketts), and Fred and Virginia Slawson (Slawsons), from the village. The Village also sought an

order enjoining village members Alexandra and Esther Kaloa (Kaloas), and Alec and Olga Constantine (Constantines), from leasing their homes to non-members. The Village alleged that the non-members violated Village Ordinance No. 4 and the members violated Village Ordinance No. 65-32.

The Pucketts and Slawsons filed counterclaims against the Village, and third-party complaints against four officers of the Village Council alleging violations of their constitutional and civil rights. The Kaloas and the Constantines moved to dismiss the Village's complaint. The remaining parties moved for summary judgment.

The district court dismissed the Village's complaint concluding the court lacked subject matter jurisdiction under 28 U.S.C. §§ 1331, 1362 and 28 U.S.C. § 2201 (Supp. IV 1986). The court dismissed the counterclaims and third-party claims concluding that the Village is immune from suit under sovereign immunity, and that the officers are protected by derivative sovereign immunity.

The Village appeals from the dismissal of the complaint. The Pucketts and Slawsons appeal from the dismissal of their counterclaims and third party claims. The Kaloas and Constantines appeal from the dismissal of the Village's complaint against them. This court has jurisdiction over each appeal under 28 U.S.C. § 1291 (1982).

The district court concluded it did not have subject matter jurisdiction over the Village's claims against the Pucketts and Slawsons because the claims merely involved the enforcement of a village ordinance which did not involve federal law. In so holding the district court relied on the rationale of *Boe v. Fort Belknap Indian*

Community, 642 F.2d 276 (9th Cir. 1981) which held that the application of a tribal ordinance did not involve a federal question. However, *Boe* is distinguishable from the present situation because *Boe* involved the application of the ordinance exclusively to tribal members.

Significantly, the Village's claims against the Pucketts and Slawsons involve the application of the village ordinance to non-members of the Tyonek village. The rule concerning the application of a tribal ordinance to non-members of a village is expressed in *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989). In *Johnson*, the Chilkat village council sought damages from non-member defendants who removed Chilkat artifacts in contravention of a Chilkat village ordinance. The district court dismissed on jurisdictional grounds. We reversed the dismissal of the claim of the Chilkat Village Council. We held that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. *Johnson*, at 1473. We concluded a federal question existed because "the heart of the controversy over the claim will be the Villages's power, under federal law, to enact its ordinance and apply it to non-Indians." *Johnson*, at 1473.

A similar question is presented in this case. The Village of Tyonek is attempting to apply its ordinance to non-members of the Tyonek village. Pursuant to Ordinance No. 4, the Village is attempting to bar non-members from staying in the village for any period longer than 24 hours unless they receive the Village's permission to remain. As in *Johnson*, the Village's power to apply this ordinance will require a showing of its authority, under federal law, to enact and enforce this ordinance against non-members of the village. *Johnson*, at 1474.

Accordingly we REVERSE the dismissal of the Village's claims against the Pucketts and Slawsons and REMAND those claims to district court. The remaining portion of the district court judgment is AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
District of Alaska

Native Village of Tyonek
v.
Donald Puckett, etal.

Judgment In A Civil Case
(Filed Dec 22, 1986)

CASE NUMBER:
A82-369 Civil

Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

xx **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED

THAT claims of Tyonek and the counterclaims of the respondents and third-party claims against Tyonek's officers are hereby dismissed.

APPROVED:

/s/ James M. Fitzgerald
James M. Fitzgerald
U.S. District Court Judge

Date

JOANN MYRES
Clerk

cc: James Vollintine,
Robert Wagstaff,
Randall Simpson (JERMAIN),
Lewis Gordon (BAILY)

Illegible
(By) Deputy Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

BEFORE: THE HONORABLE JAMES M. FITZGERALD, JUDGE

NATIVE VILLAGE OF TYONEK,
Plaintiff,
vs.
DONALD PUCKETT, ERNA PUCKETT, ALEXANDRA KALOA, ESTHER KOLOA, FRED SLAWSON, VIRGINIA SLAWSON, ALEC CONSTANTINE, and OLGA CONSTANTINE,
Defendants.

No. A82-369 Civil

FRED SLAWSON, VIRGINIA SLAWSON, DONALD PUCKETT, and ERNA PUCKETT,
Third-Party Plaintiffs,
vs.
DONALD STANDIFER, BONNIE McCORD, AL GOOZMER, and EMIL McCORD, SR.,
Third-Party Defendants.

REPORTER'S TRANSCRIPT
Wednesday, December 3, 1986
FINDINGS OF FACT CONCLUSIONS OF LAW AND DECISION

REPORTED BY: JANIS G. ROLLER, CSR, CP

PROCEEDINGS

THE COURT: I want to place of record now my decision in *Native Village of Tyonek vs. Puckett, et al.*, and *Slawson, et al., third-party plaintiffs, vs. Standifer, et al.*, third-party defendants, A82-369 Civil.

This case was argued on motions quite some time ago. In the course of their arguments, both counsel made claims of racial discrimination. In reviewing the case, I have found the issues to be both complex and difficult. Indeed, the research required on these issues exceeds that of any other case which comes to mind. It is my purpose now to place the decision on the record with the hope that, if time permits, a published decision will be filed in the case. A transcript of the decision will be prepared and placed in the record of the case setting forth the reasons upon which I reach my decision. The parties, if a copy of the transcript is desired, may order the transcript from the reporter. It is my intention, upon the filing of the transcript, to direct the clerk to enter the final order in this case.

Now, turning to the decision, approximately 43 air miles southwest of Anchorage, on the northwest shore of Cook Inlet, lies the village of Tyonek. Tanana Indians, a subgroup of the Athabaskans, are reported to have inhabited the surrounding area as early as the eighteenth century, when white explorers and settlers from Russia discovered and first colonized Alaska. The British navigator Captain James Cook reportedly observed Athabaskans in the region around 1778 when he mapped Alaska's coastline and explored the inlet that bears his name. *See* Darbyshire and Associates, *Tyonek Community*

Profile (1981); R. D. Arnold, *Alaska Native Land Claims* 13 (1978); Federal Field Commission for Development and Planning, *Alaska Natives and the Land* 255-57 (1968); *see also* Claus M. Naske and H. E. Slotniock, *Alaska: A History of the Forty-Ninth State*, 18, 27, 31-42, (1979).

This proceedings [sic] centers around an attempt by native residents of Tyonek, acting through the Village's native government established pursuant to the Indian Reorganization Act of 1934, 25 U.S.C. §§ 473a, 476 (1982), referred to as the "Native Village of Tyonek," to enforce two Village ordinances: one prohibiting non-members of the Village from leasing housing constructed at the Village's expense, and the other prohibiting non-members from remaining in Tyonek more than 24 consecutive hours.

Tyonek initiated the action by requesting this court to enforce the two ordinances against four families – two composed of Village members who "own" Village-subsidized houses and two composed of non-members seeking to lease those houses. The four families challenge the validity of the Village's ordinance prohibiting leasing of the houses, claiming that it violates the federal constitution, the federal civil rights and fair housing laws, and Alaska law. The respondents have filed counterclaims against Tyonek and third-party claims against four of Tyonek's officers. I conclude that this court lacks subject-matter jurisdiction over Tyonek's claims, which are based on the Village ordinances, and, therefore, do not *"arise under" federal law*. I further conclude that this court lacks subject-matter jurisdiction over the repondents' counterclaims and third-party claims because they are barred by Tyonek's tribal sovereign immunity and the derivative

immunity of its officers. I, therefore, dismiss Tyonek's claims and the claims of the respondents.

The Tanana Indians, who currently inhabit Tyonek, have reportedly occupied the surrounding area from as early as the eighteenth century, when white settlers first arrived in Alaska. Tyonek appears to have been the site of a Russian trading settlement in the late eighteenth century where native supplied fox pelts to the Russians in exchange for items of Russian manufacture. That settlement was destroyed, apparently, because of conflicts between local natives and the Russians.[1] *See* Darbyshire and Associates, *Tyonek Community Profile* (1981). Following the purchase of Alaska in 1867, by the United States, the American-based Alaska Commercial Company established a new trading headquarters at Tyonek for the entire upper Cook Inlet. The post was operating by 1875, and became a major disembarking point for people and supplies when gold was discovered at Resurrection Creek near Turnagain in the 1880's. *See id.* Although Tyonek has been moved twice since that time, the village has remained in essentially the same location. *See* Darbyshire and Associates, *Tyonek Community Profile* (1981).

President Woodrow Wilson, in 1915, withdrew over 25,000 acres surrounding the Village of Tyonek and established the Moquawkie Reservation "for the benefit of

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[1] The Russian trading settlement was known as "Tuiunuk," and authorities have indicated that this was probably an alternative spelling of Tyonek. *See* Darbyshire and Associates, *Tyonek Community Profile* (1981). "Tyonek" is a Siberian Yakut word meaning "little chief," while "Ti-i-u'-nuk" is an Eskimo word meaning the "marsh people." *Id.*

Alaskan Natives of that region." Executive Order 2141, February 27, 1915. In 1939, the Natives living in the Village established the "Native Village of Tyonek" by adopting a constitution and bylaws under section 16 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 473a, 476 (1982), and a corporation charter under section 17 of the act, 25 U.S.C., § 477 (1982), both of which were approved by the Secretary of the Interior.

Article II of the Village constitution and bylaws limited membership in Tyonek to those individuals then on the official list of Native residents maintained by the village, the children of Tyonek members, and other Alaska Natives who established homes in the Village and were accepted as members. The constitution provided that Tyonek members could willingly renounce their membership, could have it revoked for good cause, or could lose their membership if they "moved[d] away from the Village, intending not to return." Article II also authorized Tyonek to establish any further rules concerning membership as might be from time to time required.

Tyonek's Village counsel, in 1942, adopted Village Rule No. 4, which prohibits non-members of the Village (other than government employees) from remaining in the Village more than twenty-four consecutive hours without Tyonek's consent.[2]

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[2] According to official Tyonek records, the precise wording of Rule No. 4 is as follows:

> Any white men except government men or outsider coming in is allow [sic] to stay only 24 hrs. If

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In 1965, several oil companies paid Tyonek approximately twelve million dollars for oil and gas exploration rights in the area surrounding the Village. The Tyonek council allocated part of those proceeds to construct approximately sixty houses in the Village and established a "Family Plan" under which families comprised of Village members could apply to the Village for "housing allowances" to build and furnish new homes. On October 5, 1965, during the construction of the "Family Plan" houses, the Tyonek council unanimously passed Village Ordinance No. 65-32, which provided that:

> [T]he interests of members of the Village in houses which are acquired by such members by virtue of the Family Plan of the Village *cannot be sold, conveyed, leased, mortgaged, or otherwise alienated by any member of the Village to a person, corporation, or other legal entity which or who is not a enrolled member of the Village of Tyonek, Alaska.* It is the purpose of this [ordinance] *to insure that private interests in houses in the Village or in the Moquawkie Reservation may only be held by enrolled members of the Village.* Should any alienation be attempted in violation of this resolution, the same shall be void.

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> weather permits them to go [sic]. And is not allowed to bring any liquor [sic]. Article No. 4 have [sic] to be put up in posters. And anyone destroying these papers will be subject to penalty. Twenty-five dollars fine if caught destroying the poster [sic].

Laws of Native Village of Tyonek, Rule No. 4, May 18, 1942.

Tyonek Village Ordinance No. 65-32, October 5, 1965.[3] Title to all houses acquired under the Family Plan was taken subject to the conditions imposed by Village Ordinance No. 65-32.

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[3] Ordinance No. 65-32 was amended in 1981 by Tyonek Ordinance No. 81-1, which retained most of the original ordinance's language, but added an express prohibition barring Tyonek members from bequeathing or devising their interests in Family Plan houses (and the land on which those houses are located) to non-members of Tyonek. Tyonek Ordinance No. 81-1 provides that:

> The interests of the tribal members of the Native Village of Tyonek in houses acquired by such members by virtue of the Family Plan, and the land upon which such houses are located, shall not be sold, conveyed, leased, mortgaged, encumbered, bequeathed, devised, or otherwise alienated, by any member or any other person or entity, to a person, corporation, or other entity which is not or who is not an enrolled member of the Native Village of Tyonek. The purpose of this ordinance is to ensure that private interests in houses in Tyonek Village or in the former Moquawkie reservation may be held only by enrolled members of the Native Village of Tyonek. Any alienation or disposition in violation of this ordinance shall be void. No non-member may inherit any member's interest in the property described herein, whether by testamentary disposition or intestate succession, or otherwise. Any such purported disposition shall be void, and in such event, the village council may dispose of the deceased member's interest in such property to such of his or her heirs who are enrolled members of the Native Village of Tyonek as it may in its discretion decide, giving preference to the heir or heirs who live in the village.

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Congress, in 1971, enacted the Alaska Native Claims Settlement Act, 43 U.S.C., §§ 1601-1628 (1982). Section 19 of the Claims Act, 43 U.S.C. §§ 1618, revoked almost all native reservations in Alaska, including the Moquawkie Reservation. Section 8, 43 U.S.C. 1607, authorized the Native residents of each Village or city in Alaska to establish a Village corporation, through which they would receive land and other benefits under the Claims Act. Shortly after the passage of the Claims Act, the Native residents of Tyonek formed the for-profit Tyonek Native Corporation, to which was conveyed all the lands formerly in the Moquawkie reservation.[4] The Claims Act did not expressly change the status of Tyonek or its IRA Village government, nor did the Claims Act expressly revoke or amend Tyonek's Family Plan or Ordinance 65-32. Tyonek Native Corporation has not been directly involved in administering Tyonek's Family Plan housing, although it currently holds the surface estate of the lands on which that housing is located.

The present dispute arose in 1981-1982 when two Tyonek-member families leased their Family Plan houses to two families not composed of Tyonek members. From

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Tyonek Village Ordinance No. 81-1, July 7, 1981. Tyonek is not seeking to enforce the provisions added by the 1981 amendments in this action, nor are the defendants and third-party plaintiffs challenging those provisions.

[4] Although Tyonek's residents have established an ANCSA village corporation, Tyonek has not organized as a municipality under Alaska law. The village lies within the boundaries of Alaska's Kenai Peninsula Borough, and the Tyonek Village Council is the only village governing body.

approximately 1977 until 1981, Donald and Erna Puckett and their four children lived at the Tyonek Timber Camp outside the Village. Donald Puckett worked at the timber camp. Erna was employed part of that time as the secretary at the R. L. Bartlett School in Tyonek, and their children attended the Bartlett School. In September 1981, most of the operations of the timber camp were closed down, and, on September 30, 1981, the Pucketts requested permission in writing from Tyonek's village council to reside in the village for the remainder of the 1981-1982 school year. The council granted permission, and on October 8, 1981, the Pucketts signed a lease agreement with Esther Kaloa, a Village member, to lease her Family Plan house until June 15, 1982.

On April 28, 1982, Tyonek Village president Donald Standifer wrote the Pucketts on behalf of Tyonek to notify them that they must vacate the Kaloa house at the end of the school year, which was May 27, 1982. However, the Pucketts and Kaloa, on April 30, 1982, renewed their lease agreement for an additional year, until June 25, 1983. They included a provision in the agreement that: "[S]hould the Native Village of Tyonek, by act of the council, vote to remove lessees, by court action, this lease is automatically voided." on June 8, 1982, Standifer again wrote the Pucketts on behalf of Tyonek to remind them that the school year had ended and that their authorization to rent the Kaloa house had, therefore, elapsed. The Pucketts refused to vacate the Kaloa house.

In December, 1981, Fred and Virginia Slawson sought permission from the Tyonek council to reside in the Village, but were denied permission. Fred Slawson is a shareholder of Tyonek Native Corporation and Cook Inlet Region, Inc., and he and his wife have family in Tyonek;

but the Slawsons are not enrolled members of the Villages. On May 29, 1982, the Slawsons leased the Family Plan house of Village members Alec and Olga Constantine, and made the house their residence. The Slawsons, on June 2, 1982, made a written request to the Tyonek council for permission to remain in the Constantine house, but they were again denied permission. The Slawsons continued to reside in the Constantine house.

Tyonek brought this action in 1982 to evict the Pucketts and Slawsons and to enjoin the Kaloas and Constantines from leasing or otherwise alienating their Family Plan houses to non-members of the Village. Tyonek seeks to enforce Village Ordinance 65-32 against the Kaloas and Constantines, contending that it subsidized the construction and furnishing of their houses on the express condition that the houses be used exclusively by Village members. Tyonek also seeks to enforce Village Rule No. 4 against the Pucketts and Slawsons because they have remained in the Village for more than twenty-four hours without the consent of Tyonek.

By answer, the respondents have challenged the validity of Tyonek Ordinance 65-32 under federal and Alaska law,[5] and have brought claims for damages and injunctive relief against Tyonek and several of its officers. The Pucketts claim that in addition to filing this action, Tyonek and its president Standifer, vice president Bonnie McCord, secretary-treasurer Al Goozmer, and Village administrator Emil McCord, Sr., have engaged in other actions intended to drive them from the Village. According to the Pucketts, these included circulating petitions

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[5] The defendants challenge the validity of Village Ordinance No. 65-32, and do not specifically challenge the validity of either Village Rule No. 4 or Village Ordinance No. 81-1.

demanding that the Pucketts leave Tyonek, spreading rumors impugning the character of Erna Puckett, and changing Tyonek's policy to require all non-members of the Village to pay for their electricity, although Tyonek members receive free electricity. The Pucketts also allege that their property has been damaged by vandals and that their house was once stoned by unidentified persons, but they do not allege that Tyonek's officers were personally involved in either of these activities.

ANALYSIS

Subject-Matter Jurisdiction over Tyonek's Claims

Tyonek maintains that this court has subject-matter jurisdiction over its claims based upon three separate provisions: (1) the general "federal question" provision, 28 U.S.C. 1331 (1982); (2) the "Indian tribes" jurisdictional provision, 28 U.S.C. 1362 (1982); and (3) the federal Declaratroy Judgment Act, 28 U.S.C. 2201 (1982). to establish federal court jurisdiction under any of these three provisions, Tyonek must satisfy essentially the same threshold requirement, that is, Tyonek must demonstrate that its claims "arise under" the Constitution, laws, or treaties of the United States. *See* 28 U.S.C., 1331, 1362, 2201. Because Tyonek's claims are all predicated upon two Village ordinances and are not based upon any federal law, treaty, or constitutional provision, I conclude that this court lacks subject-matter jurisdiction over Tyonek's claims.

Federal Question Jurisdiction

The "federal question" jurisdictional provision, 28 U.S.C., 1331, provides that:

> [D]istrict courts shall have original jurisdiction of all civil actions *arising under the Constitution, laws, or treaties of the United States.*

28 U.S.C., 1331. As noted above, Tyonek's claims against the Pucketts, Slawsons, Kaloas, and Constantines are premised entirely upon Village Ordinance 65-32 and Village Rule No. 4. Tyonek has failed to identify any federal law, treaty, or constitutional provision upon which it is relying.[6] *See, generally, Price v. Hawaii*, 764 F.2d 623, 628 (9th Cir. 1985).

To the extent that Tyonek's ordinances are equivalent to municipal or borough ordinances, Tyonek's claims plainly do not "arise under" federal law. *See* 28 U.S.C., 1331. Even assuming that Tyonek qualifies as an "Indian tribe" and that its complaint therefore alleges violations of "tribal" ordinances, this alone is not sufficient to establish "federal question" jurisdiction under section 1331. The Ninth Circuit of Appeals has expressly ruled that actions brought to enforce tribal laws and ordinances do not constitute actions "arising under" the laws of the United States, and therefore do not qualify for section 1331 jurisdiction. *See Boe v. Fort Belknap Indian Community*, 642 F.2d 276, 279-80 (9th Cir. 1981).

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[6] While Tyonek's amended complaint indicates that it is seeking to enforce Village Ordinance No. 65-32 and Rule No. 4, Tyonek's action could also be characterized as one to enforce the terms of its Family Plan housing contracts with the Kaloa and Constantine Family plan housing contracts with the Kaloa and Constantine families. Yet even if viewed as a contract action, Tyonek's action still arises under Alaska state contract law and therefore does not provide a basis for federal subject-matter jurisdiction. *See Gila River Indian Community v. Henningson, Durham & Richardson*, 626 F.2d 708, 714-15 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981).

Moreover, the fact that Tyonek has an IRA government and that the ordinances involved in this case were "promulgated . . . under the authority of the IRA" does not automatically transform this into an action "arising under" the IRA, since Tyonek's claims "do not involve a dispute or controversy respecting the validity, construction, or effect of the IRA" itself. *See Boe v. Fort Belknap Indian Community*, at 279; *also Littell v. Nakai* 344 F.2d 286, 488 (9th Cir. 1965), *cert. denied*. 382 U.S. 986 (1966). I conclude the IRA does not provide a basis for invoking section 1331 jurisdiction over Tyonek's claims.

Indian Tribes Jurisdiction

Tyonek also contends that this court has subject matter jurisdiction over its claims based upon the "Indian tribes" jurisdictional provision, 28 U.S.C. 1362, which provides that:

> [D]istrict courts shall have original jurisdiction of all civil actions, brought by any Indian tribe or band with a governing body duly recognized by the Secretary of the Interior, *wherein the matter in controversy arises under the Constitution, laws, or treaties of the United States.*

28 U.S.C., 1362.

The Ninth Circuit has noted that the "arises under" proviso contained in section 1362 is virtually identical to the "arises under" language found in section 1331. *See Gila River Indian Community v. Henningson, Durham and Richardson*, 626 F.2d 708, 710, 714 (9th Cir. 1980), *cert. denied*, 451 U.S. 911 (1981). Section 1362's legislative history indicates that Congress passed the provision in 1966

specifically to enable Indian tribes to bring "federal question" cases, of the type normally brought under section 1331, in federal court without having to satisfy section 1331's then existing $10,000 amount-in-controversy requirement. The legislative history does not indicates that Congress intended to broaden Indian tribes' access to federal courts in any other respect. *See Gila River Indian Community v. Henningson, Durham and Richardson* at 710-714; *accord Arizona v. San Carlos Apache Tribe*, 463 U.S. 545, 559-60 n.10 (1983); *see also* S. Rep. No. 1507, 89th Cong., 2d Sess. 2-3 (1966); H. Rep. No. 2040, 89th Cong., 2d Sess. 2, 4 (1966); [1966] U.S. Code Cong. and Admin. News 3145; *see also Dillion v. Montana*, 634 F.2d 463, 469 (9th Cir. 1980); *Housing Authority of the City of Seattle v. Washington Department of Revenue*, 629 F.2d 1307, 1312 (9th Cir. 1980). Hence, in order to interpret the "arises under" language of section 1362 consistently with the similar language contained in section 1331, and in order to fulfill Congress' intent as revealed in section 1362's legislative history, the Ninth Circuit has expressly ruled that if an action does not qualify as "arising under" federal law for purposes of section 1331, it cannot be brought in federal court under section 1362.[7] *Gila River Indian Community v. Henningson, Durham and Richardson*, 626 F.2d at 714.

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[7] It should be noted that section 1362 does provide certain jurisdictional advantages to Indian tribes over section 1331, even now that section 1331's amount-in-controversy requirement has been eliminated. Section 1362 provides Indian tribes with an exemption to the Anti-Injunction Act, 28 U.S.C. section 1341 (1982), and thus permits them to seek injunctions in federal district court against the assessment or collection of

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Because Tyonek's claims in this action do not "arise under" federal law for purposes of section 1331, they also cannot be brought under section 1362. I conclude that section 1362 does not provide federal subject-matter jurisdiction over Tyonek's claims.

Federal Declaratory Judgment Act Jurisdiction

Finally, Tyonek contends that this court has subject-matter jurisdiction over its claims under the Federal Declaratory Judgment Act, 28 U.S.C., 2201, which provides that:

> In a case of actual controversy *within its jurisdiction* . . . any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. . . .

28 U.S.C., 2201.

It is firmly established that "[t]he Declaratory Judgment Act does not provide an independent jurisdictional basis for suits in federal court." *Fiedler v Clark*, 714 F.2d 77, 79 (9th Cir. 1983) (citing to *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671-74 (1950)). Instead, the act "merely provides an additional remedy where the court

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state taxes, *see Moe v. Confederated Salish and Kootenai Tribes*, 425 U.S. 463, 474-75 (1976), and at least one court has held that section 1362 removes states' eleventh amendment immunity to suit in actions brought by Indian tribes. *Oneida Indian Nation v. New York*, 691 F.2d 1070, 1079-80 (2d Cir. 1982).

has an otherwise valid jurisdictional basis to consider the case." *Karmali v. INS*, 707 F.2d 408, 409 (9th Cir. 1983) (citing Skelly Oil); *accord Fiedler*, 714 F.2d at 79; *Miller-Wohl Co. v. Commissioner of Labor and Industry*, 685 F.2d 1088, 1090 (9th Cir. 1982); *Alton Box Board Co. v. Espirit De Corp.* 682 F.2d 1267, 1274 (9th Cir. 1982); *Janakes v. United States Postal Service*, 768 F.2d 1091, 1093 (9th Cir. 1985); *see also Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 15-16 (1983). (quoting from *Skelly Oil*). Since there is no basis for this court to exercise subject-matter jurisdiction over Tyonek's claims under sections 1331 or 1362, or under any other provision, the Court has no subject-matter jurisdiction over Tyonek's claims under section 2201.

Lacking subject-matter jurisdiction over Tyonek's claims under section 1331, 1362, or 2201, or under any other provision, I dismiss Tyonek's claims for lack of subject-matter jurisdiction.[8]

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[8] I note, without deciding the issue, that Tyonek would appear to be entitled to pursue its claims in the Alaska state courts. The Alaska courts are courts of general jurisdiction, and are therefore authorized to resolve claims based on local or village ordinances and Alaska contract law. Moreover, even if the village of Tyonek is considered to be "Indian country", as Tyonek maintains, and its ordinances are considered to be "tribal" ordinances, the Alaska state courts are still authorized to exercise jurisdiction over Tyonek claims. *See* 28 U.S.C. § 1360(a), (c) (1982).

Subject-Matter Jurisdiction over the Pucketts' and Slawsons' Counterclaims and Third-Party Claims

The Pucketts and Slawsons[9],[10] have brought counterclaims against the Village and third-party claims against its officers Standifer, Goozmer, and the McCords, claiming that these parties violated the United States Constitution, federal civil rights and fair housing laws, the Indian Civil Right Act, 25 U.S.C., § 1302 (1982), and Alaska law by attempting to enforce Ordinance 65-32[11] against them and attempting to evict them from the Family Plan houses where they reside.[12] The Pucketts and Slawsons seek declaratory and injunctive relief, as well as compensatory and punitive damages.

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[9] The Kaloas and Constantines have not filed counterclaims against Tyonek or third-party claims against Tyonek's officers.

[10] The Kaloas and Constantines have not filed counterclaims against the Village or third-party claims against its officers.

[11] The Pucketts and Slawsons have not raised any claims based upon alleged attempts of the Village or its officers to enforce Ofdinance No.4, which prohibits white persons and, presumably, other non-members of the Village, from remaining in Tyonek for twenty-four consecutive hours without Village permission. Thus, my analysis or Ordinance No. 4 in the context of reviewing the Pucketts' and Slawsons' counterclaims and third-party claims is merely for purposes of explaining the extent and limitations of the Village's sovereign powers, as well as to provide guidance to the parties regarding future actions they may undertake.

[12] The Pucketts and Slawsons allege specifically that the Village and its officers violated article IV, section 2 of the United States Constitution, the first and fourteenth amendments

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Tyonek and its officers maintain that the Pucketts' and Slawsons' counterclaims are jurisdictionally barred by the Village's tribal sovereign immunity and that respondents' third-party claims against Standifer, Goozmer and the McCords are barred by those individuals' derivative immunity as Village officers. I agree. I conclude, based upon Tyonek's history and the manner in which the federal government has dealt with Tyonek, that the Village possesses sovereign immunity from suit like that of any other Indian tribes in the contiguous United States. I further conclude that neither the federal government nor Tyonek has waived the Village's immunity in this case or consented for the Pucketts and Slawsons to bring counterclaims against it. I also conclude that the claims of the Pucketts and Slawsons against Tyonek's officers are based upon conduct within the scope of these officers' official capacities and within the scope of the authority that the Village is capable of bestowing upon them. I conclude that the claims of the Pucketts and Slawsons, including their third-party claims, should be dismissed for lack of subject-matter jurisdiction.

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to the Constitution, the Civil Rights Act of 1871, 42 U.S.C §§ 1981-1983, 1985 (1982), the Fair Housing Act, 42 U.S.C. §§ 3604, 3617 (1982), the Indian Civil Rights Act, 25 U.S.C. § 1302 (1982), and Alaska Statutes § 18.80.210 (1985) (guaranteeing the right to obtain housing accommodations without discrimination based on race, color, or national origin). The Village also allege that Tyonek and its officers intentionally and tortiously interfered with their contractual agreement to lease the Kaloas' and Constantines' houses and with Erna Puckett's employment contract with the school, all in violation of Alaska law.

Tyonek's Immunity From Suit

Tyonek maintains that the counterclaims against it are all barred by its sovereign immunity as an "Indian tribe" or as an entity similar to an Indian tribe. The Supreme Court and other courts have consistently held that Indian tribes "possess[ ] the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978); *Puyallup Tribe, Inc. v. Department of Game of Washington*, 433 U.S. 165, 172-73 (1977); *A.K. Management Co. v. San Miguel Board of Mission Indians*, ___ F.2d ___, ___ (9th Cir. 1986); *Squaxin Island Tribe v. Washington*, 781 F.2d 715, 723 (9th Cir. 1986); *Quantum Exploration, Inc. v. Clark*, 780 F.2d 1457, 1459 n.4 (9th Cir. 1986); *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 478 (9th Cir. 1985); *Big Spring v. United States Bureau of Indian Affairs*, 767, F.2d 614, 617 (9th Cir. 1985); *Chemehvevi Indian Tribe v. California State Board of Equalization*, 757 F.2d 1047, 1050 (9th Cir.) *rev'd on other grounds*, 106 S.Ct. 2890 (1985); *see also Three Affiliated Tribes of Fort Berthold Reservation v. Wold Engineering*, 106 S.Ct 2305, 2313 (1986); Felix Cohen, *Handbook of Federal Indian Law* 324 (2d ed. 1982); W.C. Canby, Jr., *American Indian Law* 73 (1981)

Indian Tribes possess immunity from suit "because they are sovereigns predating the Constitution," *American Indian Agricultural Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985); *United States v. United States Fidelity and Guaranty Co.*, 309 U.S. 506, 512-13 (1940), and it is considered "a necessary corollary to Indian sovereignty and self-governance," *Wold Engineering*, 106 S.Ct. at 2313, essential "to preserve

[tribes'] autonomous political existence . . . [and] tribal assets," *Chemehvevi*, 757 F.2d at 1051, as well as "to promote the federal policies of tribal self determination, economic development, and cultural autonomy *Standing Rock Sioux Tribe*, 780 F.2d at 1378; *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966); *Adams v. Murphy*, 165 F. 304, 308-09 (8th Cir. 1908); *Atkinson v. Haldone*, 569 P.2d 151, 169 (Alaska 1977) (because of their limited revenue base, Indian tribes find lost assets more difficult to replace than other governmental bodies; Felix Cohen, *Federal Indian Law*, at 324-28; Note, *In Defense of Tribal Sovereign Immunity*, 95 Harv. L. Rev. 1058 (1982). Tribes have been held to possess this immunity even when they have not been officially recognized as Indian tribes by the federal government, when they have no prolonged course of dealing with federal or state governments, when they do not reside on reservations or in "Indian country," and " 'even after dissolution of the[ir] tribal government[s].' " *Bottomly v. Passamaguoddy Tribe*, 599 F.2d 1061, 1065 and nn.5-6 (1st Cir. 1979) (quoting *United States Fidelity and Guaranty Co.*, 309 U.S. at 512); *Maryland Casualty Co.*, 361 F.2d at 521-22; *Hailr v. Saunooke*, 246 F.2d 293, 296 (4th Cir. 1957). The matter of Tyonek's immunity from suit in this action is jurisdictional. *See Big Spring*, 767 F.2d at 617; *Chemehvevi*, 757 F.2d at 1051; *Kennerly v. United States*, 721 F.2d 1252, 1259 (9th Cir. 1983); *Puyallup Tribe* 444 U.S. at 172-73; *United States Fidelity and Guaranty Co.*, 309 U.S. at 512-13, and must therefore be "address[ed] first and resolve[d] irrespective of the merits of the [Pucketts' and Slawsons'] claim[s]." *See Chemehvevi*, 757 F.2d at 1051; *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on*

other grounds, 463 U.S. 713 (1983); *California ex rel. California Department of Fish and Game v. Quechan Tribe of Indians*, 595 F.2d 1153, 1154 (9th Cir. 1979).

The Pucketts and Slawsons maintain that even if the Village constitutes a tribe possessing immunity from suit, Congress and Tyonek have taken actions that have waived Tyonek's immunity as to the present action. They suggest that three specific actions have waived Tyonek's immunity: (1) Tyonek's initiation of the present litigation; (2) Congress' enactment of the Indian Civil Right Act of 1968, 25 U.S.C. §§ 1301-1341; and (3) Tyonek's adoption of a "sue and be sued" clause in its corporate charter.[13]

The Supreme Court and others courts have consistently ruled that while Congress and individual tribes

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[13] As noted above, the Puckett's and Slawson's do not appear to contend that Congress's enactment of ANCSA has waived the Village's immunity from suit. The Ninth Circuit has consistently "rejected the contention that congressional enactments unrelated to immunity may implicitly grant authority to bring suit against Indian tribes." *Chemehvevi Indian Tribe*, 757 F.2d at 1053; *see Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983). ANCSA does not contain any provisions explicitly mentioning or waiving the immunity of village governments organized under IRA section 16. *See generally* 43 U.S.C. §§ 1601- ___ [sic].

Similarly, the Puckett's and Slawson's do not contend that Congress's enactment of 28 U.S.C. § 1360, commonly known as Public Law 280, operates to waive the Village's immunity from suit. Public Law 280 authorizing particular states to exercise civil and criminal jurisdiction over the Indian country within their boundaries, and it was extended to cover Alaska in 1958. *See Wold Engineering*, 106 S.Ct. at 2314 ("We have never read Pub. L. 280 to constitute a waiver of tribal sovereign immunity. . . .").

have the authority to waive a tribe's immunity from suit, such waivers "'cannot be implied but must be unequivocally expressed.'" *Santa Clara Pueblo*, 436 U.S. at 58; *A.K. Management Co.*, ___ F.2d at ___ ; *Big Spring*, 767 F.2d at 617, *Chemehvevi Indian Tribe*, 757 F.2d at 1052-53; *Kennerly*, 721 F.2d at 1258-59; *Rehner v. Rice*, 678 F.2d 1340, 1351 (9th Cir. 1982), *rev'd on other grounds*, 463 U.S. 713 (1983); *Standing Rock Sioux Tribe*, 780 F.2d at 1378; *Ramey Construction Co. v. Apache Tribe*, 673 F.2d 315, ___ (10th Cir. 1982); *Parker Drilling Co. v. Metlakatla Indian Community* 451 F. Supp. 1127, 1136 (D.Alaska 1978); *see also Wold Engineering*, 106 S.Ct. at 2313, *Puyallup Tribe*, 433 U.S. at 172-73; *Squaxin Island Tribe*, 781 F.2d at 723 n.11. I conclude that none of the claims for waiver asserted by the Pucketts and Slawsons is sufficient to waive Tyonek's immunity from suit.

The Indian Civil Rights Act

The Pucketts and Slawsons contend, based upon the Tenth Circuit's decision in *Dry Creek Lodge, Inc. v. Arapahoe and Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), *cert. denied*, 449 U.S. 1118 (1981), and its progeny, that the Indian Civil Rights Act of 1968, 25 U.S.C. §§ 1301-1341, "constitutes a waiver of [Tyonek's] sovereign immunity under the facts in this case." I do not agree.

The Supreme Court held in *Santa Clara Pueblo* that "[n]othing on the face of . . . the Indian Civil Rights Act purports to subject tribes to the jurisdiction of the federal courts in civil actions for injunctive or declaratory relief," and that "suits against a tribe under the Act are barred by its sovereign immunity from suit." *Santa Clara Pueblo*, 436

U.S. at 59. However, in *Dry Creek Lodge*, the Tenth Circuit interpreted the decision in *Santa Clara Pueblo* to apply only to actions involving "internal [disputes] between tribal members and . . . tribal government[s]," and held that the Indian Civil Rights Act, in effect, waives tribal immunity in cases brought against tribes by non-Indians who "have no remedy within the tribal machinery nor with the tribal officials in whose election they cannot participate." *Dry Creek Lodge*, 623 F.2d at 685; *see also White v. Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("The *Dry Creek* decision ought to be interpreted to provide a narrow exception to the traditional sovereign immunity bar from suits against Indian tribes in federal courts," in light of *Santa Clara Pueblo* and because an "expansive interpretation of *Dry Creek* [would] open[ ] up the scope of lawsuits against the tribes"); *Jicarilla Apache Tribe v. Andrus*, 687 F.2d 1324, 1346 (10th Cir. 1982). The respondents contend that because they are not members of the Village and because they have raised "'particularly egregious allegations of personal restraint and deprivation of personal rights,'" against Tyonek and its officers, their counterclaims and third-party claims qualify under the exception created in *Dry Creek Lodge*, and are, therefore, not barred by Tyonek's immunity.

However, the exception carved out in *Dry Creek Lodge* does not appear to be authorized explicitly by the language or legislative history of the Indian Civil Rights Act or by the Supreme Court's analysis in *Santa Clara Pueblo*. *See Santa Clara Pueblo*, 436 U.S. at 58-72 (noting that "it is highly unlikely that Congress would have intended a private cause of action for injunctive and declaratory relief to be available in the federal counts to secure

enforcement of section 1302." and that the Indian Civil Rights Act legislative history "indicates that the Indian Civil Rights Act was generally understood to authorize federal judicial review of tribal actions only through the habeas corpus provisions of 25 U.S.C. § 1303"). Since, as has been noted, "waiver[s] of [tribal] sovereign immunity ' "cannot be implied but must be unequivocally expressed," ' *id.* at 58, the policy justifications articulated by the Tenth Circuit in *Dry Creek Lodge* seem insufficient to establish a waiver of tribal immunity under the Indian Civil Rights Act. *See Dry Creek Lodge*, 623 F.2d at 685-86 (Holloway, J., dissenting) (concluding that *Santa Clara Pueblo's* "broad" language and far-reaching conclusions preclude the result reached by the majority). Moreover, the Ninth Circuit has expressly rejected the Tenth Circuit's analysis in *Dry Creek Lodge* and has "recognized that the *Santa Clara Pueblo* holding 'foreclosed any reading of the Indian Civil Rights Act as authority for bringing civil actions in federal court to request . . . forms of relief [other than habeas corpus].'" *R.J. Williams Co. v. Fort Belknap Housing Authority*, 619 F.2d 979, 981 (9th Cir. 1983); *accord National Farmers Union Insurance Co. v. Crow Tribe of Indians*, 736 F.2d 1320, 1322-23 (9th Cir. 1984) ("Congress has expressly limited federal court review of a claimed violation of the Indian Civil Rights Act to encompass a single remedy: the writ of habeas corpus . . . A civil suit to enjoin violations of the Indian Civil Rights Act is not cognizable in federal court.") *rev'd on other grounds*, 105 S.Ct. 2447, 2450 and n.3 (1985); *Williams v. Pyramid Lake Paiute Tribe*, 625 F. Supp. 1457, 1458 (D.Nev. 1986). I reject respondent's contention that the Indian

Civil Rights Act waives Tyonek's immunity for purposes of the litigation.

The respondents also contend that Tyonek waived its sovereign immunity by initiating the present litigation. I disagree. The Ninth Circuit has held that a Indian tribe's initiation of an action against a party does not waive the tribe's immunity from suit as of counterclaims brought by that party. *Squaxin Island Tribe*, 781 F.2d at 723; *Chemehuevi*, 757 F.2d at 1053; and *see also United States Fidelity and Guaranty Co.*, 309 U.S. at 513. According to the Ninth Circuit, it would be necessary for the tribe to consent to be sued under the counterclaim, *see Squaxin Island Tribe*, 781 F.2d at 723 n.11, in order to find that a tribe has waived its immunity as to the counterclaim and for a court to require subject-matter jurisdiction over that counterclaim. Tyonek did not consent to be sued on the counterclaims raised by the Pucketts and the Slawsons. I reject respondents' contention that Tyonek waived its sovereign immunity as to their counterclaims by initiating the present lawsuit.

Finally, the respondents contend that Tyonek's adoption of a "sue and be sued" clause in its corporate character effectively waived its sovereign immunity for the purposes of this action. I reject this contention. Although the tribes clearly have the capacity to waive their sovereign immunity by adopting "sue and be sued" clauses in their corporate charters, *see, e.g., Standing Rock Sioux Tribe*, 780 F.2d at 1379; *Fontenelle v. Omaha Tribe of Nebraska* 430 F.2d 143, 147 (9th Cir. 1970); *Maryland Casualty Co. v. Citizens National Bank*, 361 F.2d 517, 521-22 (5th Cir.), *cert. denied*, 385 U.S. 918 (1966), such clauses waive the tribes' immunity only with regard to actions taken by the tribe

in its corporate capacity under section 17, of the Indian Reorganization Act and not the actions it takes in its governmental capacity under section 16 of the Indian Reorganization Act. *See Ramey Construction Co. v. Apache Tribe*, 673, F.2d 315, 320 (10th Cir. 1982); *Parker Drilling*, 451 F. Supp. 1127, 1131, 1136-37; *Kenai Oil and Gas, Inc. v. Department of Interior*, 522 F. Supp. 521, 528-29 (D. Utah 1981); *Atkinson v. Haldane*, 569 P.2d 151, 175 (Alaska 1977).

Since Tyonek is being sued in its section 16, governmental capacity, rather than its section 17, corporate capacity, the "sue and be sued" clause contained in its corporate charter does not operate to waive its sovereign immunity in this action. I reject the respondents' claims that the "sue and be sued" clause contained in Tyonek's corporate charter nullifies the tribal government's defense of sovereign immunity.

For all of these reasons, I reject the respondents' waiver claims. I conclude that Tyonek possessed sovereign immunity as to those counterclaims, and that the counterclaims against Tyonek must be dismissed for lack of subject-matter jurisdiction.

I turn now to the derivative immunity of Tyonek's officers.

The four Tyonek officers, whom the Pucketts and Slawsons have sued in this action, contend that the third-party claims against them are barred for lack of jurisdiction, and they further contend that the third-party claims are barred by their derivative immunity as officers of an Indian tribe. I agree with the contentions of Tyonek's officers. The officers of an Indian tribe possess immunity from suit so long as they are acting in their representative

capacity and within the scope of the authority that the village is capable of bestowing upon them. *See Hardin*, 779 F.2d at 479. Thus to the extent that Tyonek, acting in its section 16 sovereign governmental capacity, possessed the authority to exclude nonmembers of the Village from its "Family Plan" housing, and to the extent that Tyonek officers, who have been named in this action, did not exceed the scope of their delegated authority, those officers have derivative immunity from suit in their actions to enforce Tribal Ordinance 65-32.

There is no basis in the record for a conclusion that the four Tyonek officers acted beyond the scope of their delegated authority in their attempts to enforce the ordinance. Their actions consisted of letter writing, circulating petitions, engaging in public criticism of the Pucketts and the Slawsons, attempting to terminate the leases of the respondents, and, finally, in initiating this lawsuit. Although the Pucketts and the Slawsons have alleged in their pleadings that certain acts of vandalism occurred to their property, there is no evidence in the record or even any express allegation that any of the four third-party defendants was personally responsible for these acts. I conclude that the Tyonek officers did not act beyond the scope of their delegated authority as elected representatives of Tyonek's section 16 government entity.

Whether Tyonek's officials possess derivative immunity from suit centers around a single question: Did Tyonek, acting in its section 16, governmental capacity, have authority to exclude non-members of the Village from its "Family Plan" housing? I conclude that it did.

The record indicates the "Family Plan" houses were constructed with funds that the Village obtained from oil and gas leasing in part of the Moquawakie Reservation during the 1960s. The secretary of the Interior issued those leases in 1063 pursuant to his authority under 25 U.S.C. § 398(a), which authorizes oil and gas leasing of unallocated lands within executive order reservations such as the Moquawkie Reservation:

> Unalloted lands within the limits of any reservation or withdrawal created by Executive Order for Indian purposes or for the use or occupancy of any Indians or tribe may be leased for oil and gas mining purposes in accordance with the provisions contained in [25 U.S.C. § 398].

25 U.S.C. § 398a: *Fondahn v. Native Village of Tyonek*, 450 F.2d 520, 521 (9th Cir. 1971); *Ollestead v. Native Village of Tyonek*, 560 P.2d 31, 33 (Alaska 1977).

Pursuant to 25 U.S.C. § 398b, the proceeds from the oil and gas leases were held by the federal government in trust "for the use and benefit of the Tyonek Indians, who [were] to be consulted regarding the expenditure of funds." *Fondahn*, 450 F.2d at 522; *Ollestead*, 560 P.2d at 33. Section 398b provides that:

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive Order Indian reservations or withdrawals shall be deposited in the Treasury of the United States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection

> with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: *Provided* That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by act of Congress.

25 U.S.C. § 398b. Thus, by the express terms of section 398b, the funds obtained from Tyonek's oil and gas leases were held in trust for members of the Village alone. It was completely logical, therefore, for Tyonek to use those funds in 1965 to build housing for Village members only, and to attempt to restrict the extent to which these houses would benefit or be used by non-members of Tyonek. I conclude that a section 16 Indian governmental entity, such as Tyonek, possesses the authority to impose restrictions upon the use of property held in trust for the benefit of its members, and to prevent that property from being alienated or diminished. I conclude that Ordinance 65-32 constituted a valid exercise of Tyonek's powers as a section 16 governmental entity, and that the attempts by Tyonek's officers to enforce that ordinance that have been challenged by the Pucketts and the Slawsons in this action did not exceed the scope of Tyonek's sovereign power.

Since the third-party defendant officers all were acting in their representative capacities and within the scope of their authority as validly delegated by Tyonek, I conclude that the claims against them are barred by their derivative immunity as officers of the tribe. *See Hardin*, 779 F.2d at 479-80. Therefore, I dismiss the Pucketts' and the Slawsons' third-party claims against Tyonek's officers for lack of subject-matter jurisdiction.

That will complete this decision, which, as I have indicated, will be filed with the Clerk, and will constitute the decision in this case.

I also direct the Clerk, upon the filing of the decision to prepare a final order dismissing the claims of Tyonek and the counterclaims of the respondents and to dismiss the third-party claims against Tyonek's officers. The approval of the final order prepared by the Clerk shall constitute the final judgment in this case.

(Court adjourned.)

CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL REPORTER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ALASKA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, PAGES NUMBERED 1 THROUGH 35 INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS SUCH OFFICIAL REPORTER OF THE PROCEEDINGS HEREINBEFORE ENTITLED, AND REDUCED TO TYPEWRITING TO THE BEST OF MY ABILITY.

JANIS G. ROLLER

JANIS G. ROLLER

APPENDIX C

CONSTITUTIONAL AND STATUTORY PROVISIONS

UNITED STATES CONSTITUTION

FIRST AMENDMENT

Freedom of religion, of speech and of the press. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.[1]

FOURTEENTH AMENDMENT

§ 1. Citizenship rights not to be abridged by states. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

UNITED STATES CODE

25 USC § 398(b) Proceeds from rentals, royalties, and bonuses; disposition

> The proceeds from rentals, royalties, or bonuses of oil and gas leases upon lands within Executive order Indian reservations or withdrawals shall be deposited in the Treasury of the United

States to the credit of the tribe of Indians for whose benefit the reservation or withdrawal was created or who are using and occupying the land, and shall draw interest at the rate of 4 per centum per annum and be available for appropriation by Congress for expenses in connection with the supervision of the development and operation of the oil and gas industry and for the use and benefit of such Indians: Provided, That said Indians, or their tribal council, shall be consulted in regard to the expenditure of such money, but no per capita payment shall be made except by Act of Congress.
(Mar. 3, 1927, ch 299, § 2, 44 Stat. 1347.)

INDIAN REORGANIZATION ACT

25 USC § 473 (a) Application to Alaska

Sections 1, 5, 7, 8, 15, 17 and 19 of the Act entitled "An Act to conserve and develop Indian lands and resources; to extend to Indians the right to form business and other organizations; to establish a credit system for Indians; to grant certain rights of home rule to Indians; to provide for vocational education for Indians; and for other purposes," approved June 18, 1934 (48 Stat. 984) [25 USCS §§ 461, 465, 467, 468, 475, 477, 479], shall hereafter apply to the Territory [State] of Alaska: Provided, That groups of Indians in Alaska not heretofore recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district, may organize to adopt constitutions and bylaws and to receive charters of incorporation and Federal loans under section 16, 17 and 10 of the Act of June 18, 1934 (48 Stat. 984) [25 USCS §§ 476, 477, 470, respectively]. (May 1, 1936, ch 254, § 1, 49 Stat. 1250.)

25 USC § 476 Organization of Indian tribes; constitution and by-laws; special election

Any Indian tribe, or tribes, residing on the same reservation, shall have the right to organize for its common welfare, and may adopt an appropriate constitution and by-laws, which shall become effective when ratified by a majority vote of the adult members of the tribe, or of the adult Indians residing on such reservation, as the case may be, at a special election authorized and called by the Secretary of the Interior under such rules and regulations as he may prescribe. Such constitution and by-laws, when ratified as aforesaid and approved by the Secretary of the Interior shall be revocable by an election open to the same voters and conducted in the same manner as hereinabove provided. Amendments to the constitution and by-laws may be ratified and approved by the Secretary in the same manner as the original constitution and by-laws.

In addition to all powers vested in any Indian tribe or tribal council by existing law, the constitution adopted by said tribe shall also vest in such tribe or its tribal council the following rights and powers: To employ legal counsel, the choice of counsel and fixing of fees to be subject to the approval of the Secretary of the Interior; to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe; and to negotiate with the Federal, State, and local Governments. The Secretary of the Interior shall advise such tribe or its tribal council of all appropriation estimates or Federal projects for the benefit of the tribe prior to the submission of such estimates to the Bureau of the Budget [Office of Management and Budget] and the Congress.
(June 18, 1934, ch 576, § 16, 48 Stat. 987.)

25 USC § 477. Incorporation of Indian tribes; charter; ratification by election

The Secretary of the Interior may, upon petition by at least one-third of the adult Indians, issue a charter of incorporation to such tribe: Provided, That such charter shall not become operative until ratified at a special election by a majority vote of the adult Indians living on the reservation. Such charter may convey to the incorporated tribe the power to purchase, take by gift, or bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, including the power to purchase restricted Indian lands and to issue in exchange therefor interests in corporate property, and such further powers as may be incidental to the conduct of corporate business, not inconsistent with law, but no authority shall be granted to sell, mortgage, or lease for a period exceeding ten years any of the land included in the limits of the reservation. Any charter so issued shall not be revoked or surrendered except by Act of Congress.
(June 18, 1934, ch 576, § 17, 48 Stat. 988.)

25 USC § 495 Annette Islands reserved for Metlakahtla Indians

Until otherwise provided by law the body of lands known as Annette Island, situated in Alexander Archipelago in southeastern Alaska, on the north side of Dison's entrance, be, and the same is hereby, set apart as a reservation for the use of the Metlakahtla Indians, and those people known as Metlakahtla who have recently emigrated from British Columbia to Alaska, and such other Alaskan natives as may join them, to be held and used by them in common, under such rules and regulations, and subject to such restrictions, as may [be] prescribed from time to

time by the Secretary of the Interior.
(Mar. 3, 1891, ch 561, § 15, 26 Stat. 1101.)

INDIAN CIVIL RIGHTS ACT

25 USC § 1301 Definitions

For purposes of this title [25 USCS §§ 1301 et seq.] the term –

(1) "Indian tribe" means any tribe, band, or other group of Indians subject to the jurisdiction of the United States and recognized as possessing powers of self-government;

(2) "powers of self-government" means and includes all governmental powers possessed by an Indian tribe, executive, legislative and judicial, and all offices, bodies, and tribunals by and through which they are executed, including courts of Indian offenses; and

(3) "Indian court" means any Indian tribal court or court of Indian offense.
(Apr. 11, 1968, P. L. 90-284, Title II § 201, 82 Stat 77.)

25 USC § 1302 Constitutional Rights

No Indian tribe in exercising powers of self-government Shall –

(1) make or enforce any law prohibiting the free exercise of religion, or abridging the freedom of speech, or of the press, or the right of the people peaceably to assemble and petition for a redress of grievances;

(2) violate the right of the people to be secure in their persons, houses, papers, and effects against unreasonable search and seizures, nor issue warrants, but upon probable cause, supported by oath or affirmation,

and particularly describing the place to be searched and the person or thing to be seized;

(3) subject any person for the same offense to be twice put in jeopardy;

(4) compel any person in any criminal case to be a witness against himself;

(5) take any private property for a public use without just compensation;

(6) deny to any person in a criminal proceeding the right to a speedy and public trial, to be informed of the nature and cause of the accusation, to be confronted with the witnesses against him, to have compulsory process for obtaining witnesses in his favor, and at his own expense to have the assistance of counsel for his defense;

(7) require excessive bail, impose excessive fines, inflict cruel and unusual punishments, and in no event impose for conviction of any one offense any penalty or punishment greater than imprisonment for a term of six months or a fine of $500, or both;

(8) deny to any person within its jurisdiction the equal protection of its laws or deprive any person of liberty or property without due process of law;

(9) pass any bill of attainder or ex post facto law; or

(10) deny to any person accused of an offense punishable by imprisonment the right, upon request, to a trial by jury of not less than six persons.

(Apr. 11, 1968, P. L. 90-284, Title II, § 202, 82 Stat. 77.)

25 USC § 1303 Habeas corpus

The privilege of the writ of habeas corpus shall be available to any person, in a court of the United States, to test the legality of his detention by order of an Indian tribe.
(Apr. 11, 1968, P. L. 90-284, Title II, § 203, 82 Stat. 78.)

FAIR HOUSING ACT

42 USC § 3604 Discrimination in the sale or rental of housing

As made applicable by section 803 [42 USCS § 3603] and except as exempted by sections 803(b) and 807 [42 USCS §§ 3603(b), 3607], it shall be unlawful –

(a) To refuse to sell or rent after the making of a bona fide offer, or to refuse to negotiate for the sale or rental of, or otherwise make unavailable or deny, a dwelling to any person because of race, color, religion, sex or national origin.

(b) To discriminate against any person in the terms, conditions, or privileges of sale or rental of a dwelling or in the provision of services or facilities in connection therewith, because of race, color, religion, sex, or national origin.

(c) To make, print, or publish, or cause to be made, printed, or published any notice, statement, or advertisement, with respect to the sale or rental of a dwelling that indicates any preference, limitation, or discrimination based on race, color, religion, sex, or national origin, or an intention to make any such preference, limitation, or discrimination.

(d) To represent to any person because of race, color, religion, sex, or national origin that any

dwelling is not available for inspection, sale, or rental when such dwelling is in fact so available.

(e) For profit, to induce or attempt to induce any person to sell or rent any dwelling by representations regarding the entry or prospective entry into the neighborhood of a person or persons of a particular race, color, religion, sex, or national origin.
(Apr. 11, 1968, P. L. 90-284, Title VIII, § 804, 82 Stat. 83; Aug. 22, 1974, P. L. 93-383, Title VIII, § 808(b)(1), 88 Stat. 729.)

42 USC § 3617 Interference, coercion, or intimidation; enforcement by civil action

It shall be unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise or enjoyment of, or on account of his having exercised or enjoyed, or on account of his having aided or encouraged any other person in the exercise or enjoyment of any right granted or protected by section 803, 804, 805, or 806 [42 USCS §§ 3603, 3604, 3605, or 3606]. This section may be enforced by appropriate civil action.
(Apr. 11, 1968, P. L. 90-284, Title VIII, § 817, 82 Stat. 89.)

CIVIL RIGHTS ACT

42 USC § 1983 Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity,

or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.
(R. S. § 1979; Dec. 29, P. L. 96-170, § 1, 93 Stat. 1284.)

42 USC § 1981 Equal rights under the law

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
(R. S. § 1977.)

42 USC § 1982 Property rights of citizens

All citizens of the United States shall have the same right, in every State and Territory, as is enjoyed by white citizens thereof to inherit, purchase, lease, sell, hold, and convey real and personal property.
(R. S. § 1978).

PUBLIC LAW 280

28 USC § 1360 State civil jurisdiction in actions to which Indians are parties

(a) Each of the States or Territories listed in the following table shall have jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in the areas of Indian country listed opposite the name of the

State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action, and those civil laws of such State or Territory to the same extent that such State or Territory has jurisdiction over other civil causes of action and those civil laws of such State or Territory that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the state or Territory:

State or Territory of	Indian country affected
Alaska	All Indian country within the Territory
California	All Indian country within the State
Minnesota	All Indian country within the State, except the Red Lake Reservation
Nebraska	All Indian country within the State
Oregon	All Indian country within the State, except the Warm Springs Reservation
Wisconsin	All Indian country within the State

(b) Nothing in this section shall authorize alienation encumbrance, or taxation of any real or personal property, including water rights, belonging to any Indian or any Indian tribe, band, or community that is held in trust by the United States or is subject to a restriction against alienation imposed by the United States; or shall authorize regulation of the use of such property in a manner inconsistent with any Federal treaty, agreement, or statute or with any regulation made pursuant thereto; or shall confer jurisdiction upon the State to adjudicate, in probate

proceedings or otherwise, the ownership or right to possession of such property or any interest therein.

(c) Any tribal ordinance or custom heretofore or hereafter adopted by an Indian tribe, band, or community in the exercise of any authority which it may possess shall, if not inconsistent with any applicable civil law of the State, be given full force and effect in the determination of civil causes of action pursuant to this section. (Aug. 15, 1953, c. 505, § 4, 67 Stat. 589; Aug. 24, 1954, c. 910, § 2, 68 Stat. 795; Aug. 8, 1958, P. L. 85-615, § 2, 72 Stat. 545.)

ALASKA NATIVE CLAIMS SETTLEMENT ACT

43 USC § 1601. Congressional findings and declaration of policy

Congress finds and declares that –

(a) there is an immediate need for a fair and just settlement of all claims by Natives and Native groups of Alaska, based on aboriginal land claims;

(b) the settlement should be accomplished rapidly, with certainty, in conformity with the real economic and social needs of Natives in decisions affecting their rights and property, without establishing any permanent racially defined institutions, rights, privileges, or obligations, without creating a reservation system or lengthy wardship or trusteeship, and without adding to the categories of property and institutions enjoying special tax privileges or to the legislation establishing special relationships between the United States Government and the State of Alaska;

(c) No provision of this Act shall replace or diminish any right, privilege, or obligation of Natives as citizens of the United States or of

Alaska, or relieve, replace, or diminish any obligation of the United States or of the State of Alaska to protect and promote the rights or welfare of Natives as citizens of the United States or of Alaska; the Secretary is authorized and directed, together with other appropriate agencies of the United States government, to make a study of all Federal programs primarily designed to benefit Native people and to report back to the Congress with his recommendations for the future management and operation of these programs within three years of the date of enactment of this Act [enacted Dec. 18, 1971];

(d) no provision of this Act shall constitute a precedent for reopening, renegotiating, or legislating upon any past settlement involving land claims or other matters with any Native organizations, or any tribe, band, or identifiable group of American Indians;

(e) no provision of this Act shall effect a change or changes in the petroleum reserve policy reflected in sections 7421 through 7438 of title 10 of the United States Code [10 USCS §§ 7421-7438] except as specifically provided in this Act;

(f) no provision of this Act shall be construed to constitute a jurisdictional act, to confer jurisdiction to sue, nor to grant implied consent to Natives to sue the United States or any of its officers with respect to the claims extinguished by the operation of this Act; and

(g) no provision of this Act shall be construed to terminate or otherwise curtail the activities of the Economic Development Administration or other Federal agencies conducting loan or loan and grant programs in Alaska. For this purpose only, the terms "Indian reservation" and "trust or restricted Indian-owned land areas" in Public Law 89-136, the Public Works and Economic

Development Act of 1965, as amended, shall be interpreted to include lands granted to Natives under this Act as long as such lands remain in the ownership of the Native villages or the Regional Corporations.
(Dec. 18, 1971, P. L. 92-203, § 2, 85 Stat. 688.)

43 USC § 1607. Village Corporations

(a) Organization of Corporation prerequisite to receipt of patent to lands or benefits under chapter. The Native residents of each Native village entitled to receive lands and benefits under this Act shall organize as a business for profit or nonprofit corporation under the laws of the State before the Native village may receive patent to lands or benefits under this Act, except as otherwise provided.

(b) Regional Corporation: approval of initial articles; review and approval of amendments to articles and annual budgets; assistance in preparation of articles and other documents. The initial articles of incorporation for each Village Corporation shall be subject to the approval of Regional Corporation for the region in which the village is located. Amendments to the articles of incorporation and the annual budgets of the Village Corporations shall, for a period of five years, be subject to review and approval by the Regional Corporation. The Regional Corporation shall assist and advise Native villages in the preparation of articles of incorporation and other documents necessary to meet the requirements of this subsection.

(c) Regional Corporation stock alienation, annual audit, and transfer of stock ownership on death or by court decree: provisions applicable to Village Corporations; permissive transmittal of audits to congressional committees. The provisions concerning stock alienation,

annual audit, and transfer of stock ownership on death or by court decree provided for Regional Corporations in section 7 [43 USCS § 1606] shall apply to Village Corporations except that audits need not be transmitted to the Committees on Interior and Insular Affairs of the Senate [Energy and Natural Resources] and the House of Representatives.
(Dec. 18, 1971, P. L. 92-203, § 8, 85 Stat. 694.)

43 USC § 1618. Reservations; revocation; excepted reserve; acquisition of title to surface and subsurface estates in reserve; election of Village Corporation

(a) Notwithstanding any other provision of law, and except where inconsistent with the provisions of this Act, the various reserves set aside by legislation or by Executive or Secretarial Order for Native use or for administration of Native affairs, including those created under the Act of May 31, 1938 (52 Stat. 593) [25 USCS § 497], are hereby revoked subject to any valid existing rights of non-Natives. This section shall not apply to the Annette Island Reserve established by the Act of March 3, 1891 (26 Stat. 1101) and no person enrolled in the Metlakatla Indian community for the Annette Island Reserve shall be eligible for benefits under this Act.

(b) Notwithstanding any other provision of law or of this Act, any Village Corporation may elect within two years to acquire title to the surface and subsurface estates in any reserve set aside for the use or benefit of its stockholders or members prior to the date of enactment of this Act [enacted Dec. 18, 1971]. If two or more villages are located on such reserve the election must be made by all of the members or stockholders of the Village Corporations concerned. In such event, the Secretary shall convey the land to the Village Corporation or Corporations,

subject to valid existing rights as provided in subsection 14(g) [43 USCS § 1613(g)], and the Village Corporation shall not be eligible for any other land selections under this Act or to any distribution of Regional Corporation funds pursuant to section 7 [43 USCS § 1606], and the enrolled residents of the Village Corporation shall not be eligible to receive Regional Corporation stock.
(Dec. 18, 1971, P. L. 92-203, § 19, 85 Stat. 710.)

FEDERAL RULES OF CIVIL PROCEDURE

Rule 13. Counterclaim and Cross-Claim

(a) Compulsory Counterclaims. A pleading shall state as a counterclaim any claim which at the time of serving the pleading the pleader has against any opposing party, if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim and does not require for its adjudication the presence of third parties of whom the court cannot acquire jurisdiction. But the pleader need not state the claim if (1) at the time the action was commenced the claim was the subject of another pending action, or (2) the opposing party brought suit upon his claim by attachment or other process by which the court did not acquire jurisdiction to render a personal judgment on that claim, and the pleader is not stating any counterclaim under this Rule 13.

Supreme Court, U.S.
FILED
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Nos. 89-609; 89-1358

In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

ALEXANDRA and ESTHER KALOA;
ALEC and OLGA CONSTANTINE,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

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NOS. 89-609; 89-1358

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

ALEXANDRA and ESTHER KALOA;
ALEC and OLGA CONSTANTINE,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

JOINT OPPOSITION TO PETITIONS FOR WRIT OF CERTIORARI

Counterstatement of the Case

The respondent Native Village of

Tyonek (hereinafter "NVT") opposes the petitions for a writ of certiorari.

As the District Court found and the Ninth Circuit affirmed, this case has nothing to do with racial discrimination or with the violation of any person's civil rights. Rather, the case concerns NVT's right as a federally recognized Indian tribe to make and enforce laws essential to the tribe's political, economic and social security.

In 1965, NVT's members had a critical need for housing. Using more than $2 million of its own tribal funds, NVT constructed 60 houses for its members under a plan approved by the Secretary of the Interior pursuant to federal law. Before the houses were completed, NVT enacted a law prohibiting tribal members from leasing or renting any of these houses to

nonmembers. Upon completion, tribal members were given the houses free of charge. Petitioners Kaloas received one of these houses; petitioners Constantines received another.

In 1981, the Pucketts, nonmembers of the tribe who had never before resided in the village, requested NVT's permission to lease the Kaloas' house until June, 1982. Permission was granted upon condition that the Pucketts vacate the Kaloas' house and leave the village at the end of the lease term. In April, 1982, two days after NVT notified the Pucketts regarding the June date to vacate the Kaloas' house and leave the village, the Pucketts executed a one-year extension of their lease without informing NVT. Thereafter, they refused to respond to all requests from NVT to leave the village, ignored NVT's notice following expiration of the initial lease term that

they no longer had permission to lease the Kaloas' house, and continued to reside in the Kaloas' house.

Also in 1981, the Slawsons, nonmembers of the tribe, sought NVT's permission to reside in the village. Permission was denied. Five months later, the Slawson's rented the Constantines' house. Three days after moving in, they asked NVT for permission to rent the Constantines' house. Although permission was again denied, the Slawson's continued to reside in the Constantines' house.

NVT brought this action to exclude petitioners Pucketts and Slawsons from the tribal community and to enjoin petitioners Kaloas and Constantines from leasing their houses to nonmembers. The petitioners in No. 89-609 counterclaimed for declaratory and injunctive relief and for compensatory

and punitive damages against NVT and its officers, alleging that enforcement of NVT's laws prohibiting them from residing in the tribal community and renting houses set aside for tribal members violated constitutional and various statutory guarantees of their civil rights. The petitioners in No. 89-1358 have also charged NVT with impermissible racial discrimination.

In challenging the legitimacy of NVT's laws governing the right of nonmembers to remain in the tribal community and the leasing of certain homes by members, petitioners have sought to tar NVT and its officers for promoting an ideology and practice of "racial purity" and for inciting racial hatred. These statements are merely fabricated histrionic posturings designed to capture this Court's attention by inflaming passions and to enlist the

Court in petitioners' crusade to destroy the foundations of tribal self-government rights in Alaska. Not only do these statements have no basis in the record, as the courts below at least implicitly found, the uncontradicted record demonstrates that NVT's laws promote rights recognized in federal law. These laws have several purposes including maintaining NVT as an Athabascan tribal community, securing NVT's political integrity, protecting tribal assets and resources, and providing homes and employment for tribal members. Clerk's Record No. 50, Ex. A. NVT's laws conditioned the nonmember petitioners' entry and continued presence in the tribal community and the grant of the houses to the member petitioners.

The petitioners in No. 89-1358 moved to dismiss the complaint on the ground that federal courts should not exercise

jurisdiction over tribal claims that, if sustained, would sanction tribal racial discrimination. The District Court granted the motion to dismiss, however, on the ground that the complaint did not assert a basis for federal question jurisdiction. NVT appealed this ruling; so did the petitioners. The Ninth Circuit held that the petitioners had no standing to appeal and affirmed the District Court's dismissal of the complaint as to these petitioners.

The petitioners in No. 89-609 and NVT moved the District Court for summary judgment. The District Court, sua sponte, dismissed NVT's complaint for lack of federal question jurisdiction and dismissed petitioners' counterclaims as barred by NVT's sovereign immunity. The District Court also found no evidence that NVT's officers in any way harassed petitioners or committed any acts of vandalism with

respect to petitioners' property. On appeal, the Ninth Circuit affirmed the dismissal of the counterclaims and reversed the dismissal of NVT's complaint, remanding to the District Court the trial of NVT's complaint against these petitioners. The trial has not yet occurred and perhaps never will. Since the petitioners in No. 89-609 moved from the village several years ago and the petitioners in No. 89-1358 have been dismissed as parties, NVT's action may be moot.

REASONS THE WRITS SHOULD BE DENIED

Petitioners now seek writs of certiorari from this Court. Not surprisingly, they and the State of Alaska as amicus curiae offer no arguments that

were not fully litigated, considered, and decided against them both by the District Court and the Court of Appeals. Moreover, the issues petitioners ask this Court to address challenge rulings that do no more than reconfirm long settled law. These issues have no substantial significance outside of Alaska and have significance in Alaska only because the State of Alaska has sought in recent years, albeit unsuccessfully, to carve out an Alaska exception to the body of federal Indian law generally applicable throughout the rest of the United States.

This Court ordinarily does not grant certiorari where the law is settled. The Ninth Circuit's decision is not in conflict with decisions of any of the other Courts of Appeals. While, as petitioners and the State of Alaska note, dicta in a recent decision of the Alaska Supreme Court

appears to be in conflict with the rulings below, this decision ignored the applicable law and instead relied on ancient federal court decisions [1] effectively stripped of any validity by subsequent federal court decisions and congressional action. With respect to NVT, even this decision followed and is not in conflict with the decisions below. Petitioners claims have been properly rejected and there is no substantial reason for this Court to grant further review.

I. THE NINTH CIRCUIT CORRECTLY DECIDED THE ISSUES ON WHICH PETITIONERS SEEK REVIEW AND THOSE ISSUES IN ANY EVENT ARE NOT SUBSTANTIAL.

Despite the fact that the issues

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[1] See, Niedermeyer, "The True Interests Of A White Population": The Alaska Indian Country Decisions of Judge Matthew P. Deady, 21 N.Y.U. Journal of International Law and Politics 195 (1988), analyzing and discrediting each of these decisions.

raised seek to have this Court overturn long established principles of law not in dispute outside of Alaska, petitioners have attempted to construct "questions presented" which have broader application. Petitioners' efforts notwithstanding, none of those issues merits this Court's attention.

A. NVT Is An Indian Tribe Recognized By The United States And, Consequently, Possesses Sovereign Immunity From Unconsented Suit.

Petitioners accept that if NVT is an Indian tribe, NVT's sovereign immunity, absent waiver thereof, bars their counterclaims. Accordingly, petitioners urge this Court to review the rulings below that NVT is an Indian tribe.

The District Court concluded that "based upon Tyonek's history and the manner

in which the Federal government has dealt with Tyonek, that the Village possesses sovereign immunity from suit like that of any other Indian tribes...." Pet. in No. 89-609 at App. 24. Pertinent to the District Court's conclusion were, inter alia, the facts that ancestors of NVT's members had inhabited Tyonek and its environs for more than 200 years, the United States had established a reservation for the Indians of the Tyonek area, these reservation Indians organized under the Indian Reorganization Act, 25 U.S.C. sec. 476, and thereafter enacted laws governing both members and nonmembers of the tribe, and the Alaska Native Claims Settlement Act (hereinafter "ANCSA"), 43 U.S.C. sec. 1601 et seq., settled NVT's aboriginal land claims without affecting NVT's tribal status or self-government rights. Id. at 10-14.

The facts relied upon by the District Court substantially abbreviated the evidentiary record of United States' recognition of NVT's tribal status. From the time Alaska was purchased in 1867, the tribal status of the Athabascan Indians of Tyonek, as well as the tribal status of other Alaska Native communities, has been repeatedly recognized by every branch of the federal government and has not been differentiated from the status of tribes outside of Alaska.

An express purpose of the reservation established by President Wilson for the Athabascan Indians of the Tyonek area was protecting the ability of "such tribes" to be "self-support[ing] and industr[ious]" by insulating them against "white intrusion." Oil and Gas Leasing on Lands Withdrawn by Executive Order for Indian Purposes in

Alaska, 70 I.D. 166, 175-176 (1963). [2] Subsequently, the Department of the Interior has recognized NVT's tribal status. See e.g., id; Leasing Lands Within Indian Reservations Created for the Benefit of the Natives of Alaska, 49 I.D. 592, 592-593 (1923); Status of Alaskan Natives, 53 I.D. 593, 605 (1932); 47 F.R. 53130, 53135; 51 F.R. 25115, 25119.

In 1939, the Secretary of the Interior

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[2] Throughout the history of the United States, the federal government has regulated and controlled non-Indian entry into Indian country and has evicted non-Indians who violated these regulations. See e.g., United States v. Cadzow, 5 Ak. Rpts. 125 (D. Alaska 1914); United States v. Berrigan, 2 Ak. Rpts. 442 (D. Alaska 1905). A purpose of ANCSA was to protect Native villages against an influx of non-Natives. Aleknagik Natives, Ltd. v. United States, 635 F.Supp. 1477, 1494 (D. Alaska 1985), aff'd., 806 F.2d 924 (9th Cir. 1986). This national policy sought to protect the Indian minority from exploitation and abuse by the non-Indian majority. The need for this policy, including in Alaska, has not abated.

approved NVT's organization under the Indian Reorganization Act, further confirming NVT's tribal status. New Mexico v. Mescalero Apache Tribe, 462 U.S. 324, 334-335, 335 n.17 (1983). [3]

NVT has also been the beneficiary of numerous services and programs administered exclusively for Indian tribes by the Bureau of Indian Affairs, the Indian Health Service, the Department of Housing and

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[3] Petitioners erroneously cite State of Alaska v. Native Village of Venetie, 856 F.2d 1384, 1387 (9th Cir. 1988), as holding that Indian Reorganization Act ("IRA") organization is not conclusive evidence of tribal status. Pet. in No. 89-609 at 10-11. As Native Village of Noatak v. Hoffman, ___F.2d___ (9thCir. 1990), Sl.Op. at 1493, clarified, IRA organization is conclusive evidence of tribal status where no uncertainty exists concerning the structure of the tribal entity involved. Moreover, the District Court and the Ninth Circuit did not ground NVT's tribal status on IRA organization alone. Rather, IRA organization was but one of a number of aspects of NVT's history that in combination supported the conclusion that NVT is an Indian tribe.

Urban Development, the Department of Education, the Department of Health and Human Services, and the Department of the Treasury.

Congress has also recognized the tribal status of Alaska Native villages like NVT by applying to them the general law governing state jurisdiction in Indian country, 18 U.S.C. sec. 1162 and 28 U.S.C. sec. 1360, and by expressly recognizing the right of these villages as tribes to participate in and receive the benefits of every statute authorizing programs and benefits for Indian tribes and their members. **See e.g.**, Indian Self-Determination Act, 25 U.S.C. sec. 450b(e); Indian Financing Act, 25 U.S.C. sec. 1452(c); Indian Child Welfare Act, 25 U.S.C. sec. 1903(8); Indian Tribal Government Tax Status Act, 26 U.S.C. sec. 7701(40).

For many years, the courts have also recognized NVT's tribal status. See e.g., Alaska Chapter, Associated General Contractors of America v. Pierce, 694 F.2d 1162, 1169 n. 10 (9th Cir. 1982); Fondahn v. Native Village of Tyonek, 450 F.2d 520, 521 (9th Cir. 1971)(construing 25 U.S.C. sec. 398b, a statute only applicable to "tribe[s] of Indians"); Territory of Alaska v. Annette Island Packing Co., 289 F. 671, 674 (9th Cir. 1923); Nagle v. United States, 191 F. 141, 142 (9th Cir. 1911); United States v. Booth, 161 F.Supp. 269, 271, 273 (D. Alaska 1958); Petition of McCord, 151 F.Supp. 132, 133, 136 (D. Alaska 1957); In re Minook, 2 Ak. Rpts. 200, 220-221 (D. Alaska 1904). Even the Alaska Supreme Court in Native Village of Stevens v. Alaska Management and Planning, 757 P.2d 32, 35-36 n. 4 (1988), acknowledged that NVT may indeed have

tribal status. See also, Ollestead v. Native Village of Tyonek, 560 P.2d 31 (Alaska 1977).

B. The Alaska Native Claims Settlement Act Confirms NVT's Tribal Status.

The facts that ANCSA revoked NVT's reservation and that a state-chartered corporation organized and owned by NVT's members pursuant to ANCSA now holds title to most of the lands of the former reservation, including the lands occupied by the petitioners' Kaloas' and Constantines' houses, do not affect NVT's tribal status or sovereign immunity from suit.

The District Court concluded that ANCSA "did not expressly change the status of Tyonek or its IRA Village government," Pet. in No. 89-609 at App. 14, and "does

not contain any provisions explicitly mentioning or waiving the immunity [from suit] of village governments organized under IRA section 16." Id. at App. 27 n. 13. ANCSA, as well as every judicial and other construction of its provisions, support these conclusions.

It has been repeatedly observed that ANCSA's only purpose was to settle the aboriginal land claims of Alaska Natives. See e.g., United States v. Atlantic Richfield Co., 435 F.Supp. 1009, 1018, 1021, 1022, 1031 (D. Alaska 1977), aff'd., 612 F.2d 1132 (9th Cir. 1980), cert. den., 449 U.S. 888 (1980); Edwardsen v. Morton, 369 F. Supp. 1359, 1365, 1376, 1378 (D.D.C. 1978). Such claims may only be asserted by tribes. Oneida Indian Nation v. County of Oneida, 414 U.S. 661 (1974). Nothing in ANCSA terminated the tribal status of any of the Alaska Native villages, including NVT. And, nothing in ANCSA waived the

sovereign immunity from suit of these villages. The tribal status of Alaska Native villages is apparent from the fact that in every post-ANCSA federal statute of general applicability to Indian tribes, Alaska Native villages have been treated as Indian tribes. **See e.g.**, Indian Self-Determination Act, 25 U.S.C. sec. 450b(e); Indian Financing Act, 25 U.S.C. sec. 1452(c); Indian Child Welfare Act, 25 U.S.C. sec. 1903(8). In addition, the Secretary of the Interior, post-ANCSA, has continued in Alaska to apply Indian liquor laws only applicable in Indian country. **See e.g.**, 51 F.R. 28779; 48 F.R. 30195; 48 F.R. 21378.

In fact, ANCSA explicitly recognizes the tribal status of NVT and the other Alaska Native villages. ANCSA lands and other benefits are expressly provided for and on behalf of "Native villages," a term defined to mean "any tribe, band, clan,

group, village, community, or association in Alaska...composed of twenty-five or more Natives." 43 U.S.C. sec. 1602(c). ANCSA also provided for an ongoing federal wardship and trusteeship with respect to Alaska Natives. 43 U.S.C. sec. 1601(b) and (g); 43 U.S.C. sec. 1626(d). **See also,** Native Village of Noatak v. Hoffman, supra, 81.Op. at 1493 (ANCSA is congressional recognition of the tribal status of Alaska Native villages); Final Report to the Congress of the American Indian Policy Review Commission, 95th Cong. 1st Sess. 490-492 (May 17, 1977)(ANCSA did not terminate the tribal status or sovereign powers of any Alaska Native villages); Status of the Native Village of Tyonek Under the Alaska Native Claims Settlement Act, Opinion of the Solicitor of the Department of the Interior (Sept. 13, 1972), Clerk's Record No. 83 ("Except for the revocation of its reservation...the

village's status and powers as a governmental and as a corporate entity under the Indian Reorganization Act continue undiminished"). [4]

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[4] The fact that pursuant to ANCSA a corporation owned by NVT's members now owns the lands of NVT's former reservation also does not terminate the Indian country status of these lands, Mattz v. Arnett, 412 U.S. 481, 490, 497 (1973); United States v. Chavez, 290 U.S. 357, 364 (1933); United States v. South Dakota, 665 F.2d 837 (8th Cir. 1981), cert. den., 459 U.S. 823 (1982); 18 U.S.C. sec. 1151(b), or diminish NVT's sovereign powers to govern those who inhabit or enter the Indian country under its jurisdiction. Merrion v. Jicarilla Apache Tribe, 455 U.S. 130, 144-145, 145 n. 11 (1982); Mattz v. Arnett, supra, 412 U.S. at 497; United States v. Wright, 51 F.2d 300, 306 (4th Cir. 1931), cert. den., 285 U.S. 539 (1932); Buster v. Wright, 135 F. 947, 951-952 (8th Cir. 1905), app. dism., 203 U.S. 599 (1905).

C. Petitioners' Constitutional and Civil Rights Claims Do Not Override NVT's Sovereign Immunity From Suit.

Ever since United States v. United States Fidelity and Guaranty Co., 309 U.S. 506 (1940), dozens of decisions have reiterated the settled law that the sovereign immunity of Indian tribes, absent federal diminution, is coextensive with that of the United States. **See e.g.,** Three Affiliated Tribes of the Fort Berthold Reservation v. Wold Engineering, 476 U.S. 877, 890-891 (1986); Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); Puyallup Tribe, Inc. v. Department of Game of Washington, 433 U.S. 165, 172-173 (1977). This immunity applies to constitutional and statutory claims. Lynch v. United States, 292 U.S. 571, 582 (1934). The District Court, and the Court of Appeals in affirming, have correctly and unexceptionably adhered to these

principles. Pet. in No. 89-609 at App. 25-26.

Petitioners do not dispute the settled law on tribal sovereign immunity; they just ask the Court to overturn it. In support of this request, they argue that NVT does not have the sovereign authority to determine whether nonmembers of the tribe can reside in the village of Tyonek or rent homes that NVT constructed for tribal members.

Essentially petitioners seek to condition NVT's sovereign immunity on a determination of the merits of their claims. But, as the District Court noted, immunity from suit is jurisdictional and must be determined without regard to the merits of petitioners' claims. Pet. in No. 89-609 at

App. 26-27. [5]

Petitioners would make tribes amenable to unconsented suit for money damages. To do so would destroy tribal sovereignty and self-governance, radically and fundamentally altering the status of tribes under federal law and seriously threatening their economic security and cultural autonomy. Nothing in this case justifies these far-reaching and perilous consequences.

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[5] If NVT's action proceeds to trial and petitioners defend (as they have in their answer) on the basis that NVT's actions exceeded its sovereign powers, a judgment in petitioners' favor is likely if the defense is sustained. Brendale v. Confederated Tribes and Bands of Yakima Indian Nation, ___U.S.___, 109 S.Ct. 2994 (1989)(federal courts have authority to determine whether Indian tribes' sovereign powers permit regulation of nonmember activities within the tribal community and to enter judgment against tribes where such powers have been exceeded).

D. NVT Has Not Waived Its Sovereign Immunity.

In asking this Court to review the determinations below that NVT's sovereign immunity has not been waived, petitioners again seek to overturn well-established legal principles.

While NVT does have a "sue and be sued" clause in its corporate charter, it does not have such a clause in its constitution. The courts below correctly found that all of NVT's actions at issue were tribal governmental actions undertaken pursuant to constitutional, and not corporate charter, authority. These findings are clearly supported by the fact that petitioners counterclaims challenged the legitimacy of two tribal laws and the enforcement of these laws. The District Court's ruling that "sue and be sued"

clauses in a tribe's corporate charter "waive the tribe's immunity only with regard to actions taken by the tribe in its corporate capacity...and not the actions it takes in its governmental capacity," Pet. in No. 89-609 at App. 31-32, is in accord with this Court's longstanding doctrine that waivers of sovereign immunity must be unequivocally and unambiguously expressed. Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 58-59. It also follows a substantial line of authority applicable to tribal charter "sue and be sued" clauses. See e.g., Seneca-Cayuga Tribe v. State ex rel. Thompson, 874 F.2d 709, 715 n. 9 (10th Cir. 1989); Namekagon Development Co. v. Boise Forte Reservation Housing Authority, 517 F.2d 508 (8th Cir. 1975); Maryland Casualty Co. v. Citizens National Bank of West Hollywood, 361 F.2d 517, 520-521 (5th Cir. 1966).

Even assuming that Fontenelle v. Omaha

Tribe of Nebraska, 430 F.2d 143 (8th Cir. 1970), supports a rule that "sue and be sued" tribal corporate charter clauses waive the sovereign immunity of tribes for actions undertaken in a governmental capacity, Fontenelle has been superseded by Namekagon Development Co. and by American Indian Agricultural Credit Consortium v. Standing Rock Sioux Tribe, 780 F.2d 1374, 1379-1380 (8th Cir. 1985), decisions of the Eighth Circuit that are consistent with the rulings of the Fifth, Ninth and Tenth Circuits on this issue.

Petitioners also seek review of the rulings below that Rule 13(a) of the Federal Rules of Civil Procedure did not waive NVT's sovereign immunity. This Court long ago held that tribal sovereign immunity extends to counterclaims. United States v. United States Fidelity and Guaranty Co., supra, 309 U.S. at 513. The circuit courts of appeal also reject

petitioners' position. See e.g., Citizen Band Potawatomi Indian Tribe of Oklahoma v. Oklahoma Tax Commission, 888 F.2d 1303, 1304-1305 (10th Cir. 1989); Squaxin Island Tribe v. Washington, 781 F.2d 715, 723 (9th Cir. 1986). [6]

Finally, in direct opposition to this Court's holding in Santa Clara Pueblo v. Martinez, supra, petitioners maintain that

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[6] Petitioners rely on United States v. Oregon, 657 F.2d 1009 (9th Cir. 1981), and Jicarilla Apache Tribe v. Andrus, 687 F.2d 1324 (10th Cir. 1982), to support a claim that there is law conflicting with the rulings below. If conflict exists, these cases have been superseded respectively by Squaxin Island Tribe and Citizen Band Potawatomi Indian Tribe of Oklahoma. In fact, no conflict exists. Jicarilla Apache Tribe involved a claim in recoupment not, as here, a counterclaim for money damages against a tribe. And, United States v. Oregon, involving a tribe that unlike NVT had expressly consented to be bound by a federal court judgment, was clarified in Pan American Co. v. Sycuan Band of Mission Indians, 884 F.2d 416, 419-420 (9th Cir. 1989), in a way that eliminates any disharmony between that case and subsequent Ninth Circuit decisions upholding tribal immunity from unconsented counterclaims.

the Indian Civil Rights Act, 25 U.S.C. sec. 1301 et seq., waived NVT's sovereign immunity. The rulings below followed Santa Clara Pueblo. Petitioners seek review on the premise that these rulings conflict with a purportedly applicable exception to Santa Clara Pueblo adopted by the Tenth Circuit in Dry Creek Lodge, Inc. v. Arapaho-Shoshone Tribe, 623 F.2d 682 (10th Cir. 1980), cert.den., 449 U.S. 1118 (1981). While the Ninth Circuit has flatly rejected this exception, R.J. Williams Co. v. Fort Belknap Housing Authority, 719 F.2d 979, 981 (9th Cir. 1983), cert.den., 472 U.S. 1016 (1985), ever since Dry Creek Lodge, the Tenth Circuit in a number of decisions has back pedaled away from it and has stressed that Dry Creek Lodge is to be very narrowly construed and applied in only the most extreme circumstances. See e.g., Enterprise Management Consultants, Inc. v. United States ex rel. Hodel, 883 F.2d 890,

892 (10th Cir. 1989). Santa Clara Pueblo is dispositive. Petitioners offer no valid basis for this Court to review it.

E. NVT's Officers Are Immune From Petitioners' Counterclaims.

The courts below concluded that NVT's officers are immune from petitioners' counterclaims because in seeking to enforce NVT's laws, they acted within the scope of their authority and within the scope of NVT's sovereign powers. The District Court concluded that because the houses petitioners sought to rent were built with tribal funds held in trust by the United States pursuant to federal law for the sole benefit of tribal members, NVT had the authority to restrict the use of these houses to members of the tribe. In addition to the fact that NVT's laws restricting nonmember use of these houses carries out the purposes of 25 U.S.C. sec. 398b and is

expressly sanctioned by 25 U.S.C. sec. 476, this Court's decisions establishing the right of tribes to regulate nonmembers' activities in the tribal community also support NVT's actions.

Montana v. United States, 450 U.S. 544, 563-566 (1981), held that tribes may regulate the activities of nonmembers who enter consensual relationships with the tribe or tribal members and exercise civil authority over the conduct of nonmembers "when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health and welfare of the tribe." All of petitioners' activities in seeking NVT's permission to reside in the village and rent certain houses involved consensual relationships with the tribe and tribal members. Moreover, the undisputed evidence presented on the cross-motions for summary judgment was clear that NVT's actions sought to

protect a threat to its political integrity, economic security, health and welfare. Clerk's Record No. 50, Ex. A.

Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 144, also held that tribes may place conditions on nonmembers' entry into and on their continued presence and conduct in the tribal community, rights that include the power to exclude nonmembers. Petitioners' entry and continued presence in NVT's community was conditioned on compliance with NVT's laws governing entry and occupancy of the homes built with tribal funds. Petitioners deliberately violated these laws, actions that resulted in NVT's efforts to exclude them from the tribal community. In light of Merrion, when a tribe exercises its power to exclude nonmembers it legitimately promotes self-government and is not

engaging in unlawful activity. [7]

Even if NVT's officers had not acted in a representative capacity, the District Court made findings of fact, after review of a substantial evidentiary record, that there is no evidence of any actionable conduct by these officers. Pet. in No. 89-609 at App. 16-17, 33.

II. PETITIONERS IN NO. 89-1358 DO NOT HAVE STANDING TO PETITION FOR A WRIT OF CERTIORARI.

Petitioners Kaloas and Constantines

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[7] In stating that the rulings below conflict with Santa Clara Pueblo v. Martinez, supra, and Puyallup Tribe, Inc. v. Department of Game of Washington, supra, the State of Alaska completely misrepresents the holdings of these cases. By referring to Ex parte Young, 209 U.S. 123 (1908), Santa Clara Pueblo, 436 U.S. at 59, only restated the principle that tribal officers are not immune from suit for unlawful actions. The rulings below are not in conflict. They simply affirmed that the actions of NVT's officers were lawful and, therefore, protected by NVT's sovereign immunity.

moved to dismiss in the District Court. Their motion was granted, albeit for reasons different from those argued in support of dismissal. Not satisfied with the grounds for dismissal, these petitioners appealed. The Ninth Circuit affirmed the dismissal, again on grounds petitioners find unsatisfactory. In affirming, the Ninth Circuit held that having obtained dismissal of the complaint in the District Court, these petitioners have no standing to appeal. Supp. Br. in No. 89-609 at 13900-13901. Since the Ninth Circuit has affirmed the dismissal of the complaint against these petitioners, they have no standing to petition this Court for further review simply because they would prefer the basis for the dismissal to be different. Id.

III. NVT HAS NOT ENGAGED IN RACIAL DISCRIMINATION PROHIBITED BY THE CONSTITUTION OR FEDERAL LAW.

Assuming that petitioners in No. 89-1358 have standing, their racial discrimination claims are without merit and, in effect, were rejected by the rulings below dismissing the counterclaims of the petitioners in No. 89-609.

NVT's action to exclude the petitioners in No. 89-609 and to enforce Ordinance No. 65-32 with respect to the petitioners in No. 89-1358 are not based on prohibited racial discrimination. These were governmental acts taken for legitimate governmental purposes. **See** Clerk's Record No. 50, Ex. A; Standifer deposition at 55-58. NVT has the governmental powers to exclude nonmembers, Merrion v. Jicarilla Apache Tribe, supra, 455 U.S. at 147-152, to regulate the consensual relationships entered into between tribal members and

nonmembers, Montana v. United States, supra, 450 U.S. at 563-566, and to control internal and social relations, Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 55. These powers necessarily include the right to limit or condition the ability of tribal members to rent homes to nonmembers. Thus in bringing an action in federal court to exclude the nonmember petitioners and to compel the tribal member petitioners, now no longer parties, to comply with tribal law governing the rental of their houses, NVT does not seek enforcement of private racially restrictive covenants, the focus of Shelley v. Kraemer, 334 U.S. 1 (1948), and Hurd v. Hodge, 334 U.S. 24 (1948). Rather, NVT seeks federal court enforcement of its governmental rights sanctioned by federal law. Accordingly, NVT has not

violated any applicable civil rights laws. [8]

CONCLUSION

Upon consideration of all of the arguments presented here and a thorough evidentiary record, the courts below concluded that NVT is an Indian tribe possessing sovereign immunity from unconsented suit. These decisions raise no novel issues and are anchored in and

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[8] The Indian Civil Rights Act, 25 U.S.C. sec. 1302, is the only civil rights law applicable to NVT. The Fifth and Fourteenth Amendments are inapplicable. Santa Clara Pueblo v. Martinez, supra, 436 U.S. at 56-57. The 1866 Civil Rights Act also does not apply. That law applied only to United States citizens. In 1866, Indian tribes and their members were not citizens. Elk v. Wilkins, 112 U.S. 94, 99-100 (1884); Cherokee Nation v. Georgia, 30 U.S. 1, 16, 19-20 (1831). And, even assuming that the Fair Housing Act applies to tribes, the racial discrimination that it prohibits is limited to circumstances not part of the facts in this case. 42 U.S.C. sec. 3603.

reflect a body of law about which there is no dispute. Further review by this Court is not merited.

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In The

Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE STATE OF ALASKA AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Does the village council of the Native Village of Tyonek – which is not on or near an Indian reservation – have the authority (1) to prohibit non-members of the village from renting homes in the village, or (2) to prohibit non-Natives from remaining in the village for more than 24 hours?

2. Are the officers of the village council of the Native Village of Tyonek entitled to immunity for acts of discrimination against non-Natives and non-members of the village?

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INTEREST OF THE STATE OF ALASKA

The Attorney General of the State of Alaska files this amicus curiae brief in support of the petition for writ of certiorari filed on behalf of Donald and Erna Puckett and Fred and Virginia Slawson. The State of Alaska has a very definite interest in a case which is about the violation of the fundamental right to live and work where one wishes.

The decisions in the case are of great concern to the State of Alaska. There are more than 200 Native villages in Alaska that are similar to the Native Village of Tyonek. None of those Native villages occupies a reservation. Many of those Native villages have organized under the 1936 Alaska amendments to the Indian Reorganization Act (I.R.A.) or have traditional Native councils in the village. There are a significant number of Natives and non-Natives who live and work in these villages but who are not members of the Native village. The potential for the involuntary displacement of an unknown number of citizens of Alaska now exists because the Ninth Circuit has affirmed the conclusion of the United States District Court for the District of Alaska that the Native Village of Tyonek had the authority to prevent non-members of the village from obtaining housing in that village. Severe adverse consequences could result from attempts by other Native villages to enact and implement similar ordinances.

In addition, the Ninth Circuit decision may have an impact in other states, especially in the western United States. A decision which allows off-reservation but

predominantly Indian communities to exclude non-members is a dangerous precedent, especially if the officials are not accountable for their actions.

This Court should grant the petition for certiorari because the Ninth Circuit's ruling is inconsistent with basic freedoms guaranteed by the United States Constitution and is inconsistent with this Court's previous rulings.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE NINTH CIRCUIT DIRECTLY CONFLICTS WITH PREVIOUS RULINGS OF THIS COURT

The United States District Court for the District of Alaska ruled that "officers of an Indian tribe [Tyonek] possess immunity from suit so long as they are acting in their representative capacity and within the scope of the[ir] authority," citing *Hardin v. White Mountain Apache Tribe*, 779 F.2d 476, 479 (9th Cir. 1985). The district court then concluded that Tyonek had the authority to "exclude non-members of the Village from its 'Family Plan' housing." Therefore, the claims of the Petitioners against tribal officers were "barred by their derivative immunity as officers of an Indian tribe."[1] Appendix B at pages 32-33.

[1] The claims were for both damages and injunctive relief. Appendix B at page 16.

The Ninth Circuit summarily affirmed. Appendix A at page 5.[2] [3]

The Ninth Circuit decisions in *Hardin* and in this case squarely contradict this Court's rulings in *Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978) and *Puyallup Tribe v. Washington Game Dept*, 433 U.S. 165 (1977).

In *Puyallup Tribe* this Court considered the immunity of a tribe from suit over treaty fishing rights. After acknowledging the sovereign immunity of the Puyallup Tribe, this Court stated:

> Second, whether or not the Tribe itself may be sued in a state court without its consent or that of Congress, a suit to enjoin violations of state law by individual tribal members is permissible. The doctrine of sovereign immunity which was applied in *United States v. United States Fidelity & Guaranty Co.*, 309 U.S. 506, does not immunize the individual members of the Tribe.

Puyallup Tribe at 171-172.

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[2] The references are to Appendices A and B of the Petition for Writ of Certiorari filed on October 10, 1989 on behalf of the Pucketts and the Slawsons.

[3] The district court also apparently decided that the Native Village of Tyonek, which was organized under the 1936 Alaska amendments to the Indian Reorganization Act, is a federally recognized Indian tribe because it ruled that Tyonek had sovereign immunity. Appendix B at page 24. Otherwise, Tyonek obviously would not have any claim to sovereign immunity. Yet, the Alaska amendments were specifically set up to organize groups other than tribes and is therefore not conclusive of tribal status. *Native Village of Stevens v. AMP*, 757 P. 2d 32 (Alaska 1988); *State of Alaska v. Native Village of Venetie*, 856 F.2d 1384 (9th Cir. 1988); *Contra Native Village of Noatak v. Hoffman*, 872 F.2d 1384 (9th Cir. 1989) (petition for rehearing pending).

About a year later this Court unequivocally reaffirmed the ruling in *Puyallup Tribe* when it said that "[a]s an officer of the Pueblo, petitioner Lucario Padilla is not protected by the tribe's immunity from suit." *Santa Clara Pueblo v. Martinez*, 436 U.S. at 59.[4]

This Court, unlike the Ninth Circuit, has never recognized the Ninth Circuit exception to that rule of law. In this case, the exception would frustrate this Court's recognition of the "propriety of inferring a federal cause of action for the enforcement of civil rights," *Santa Clara Pueblo* at page 61, and would enlarge the scope of a doctrine of questionable vitality. *Puyallup Tribe* at page 178 (Justice Blackmun, concurring).

The Ninth Circuit decision is wrong and should be reversed by this Court.

II. EVEN ASSUMING THAT IMMUNITY EXISTS, UNDER THE FACTS OF THIS CASE THE OFFICERS OF THE NATIVE VILLAGE OF TYONEK ARE NOT ENTITLED TO RELY ON DERIVATIVE IMMUNITY SINCE THE NATIVE VILLAGE OF TYONEK HAS NO AUTHORITY TO ENFORCE THE ORDINANCES AT ISSUE IN THIS CASE

The land upon which the Native Village of Tyonek is located was at one time an executive order reservation.

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[4] Under the tribal membership rules of the pueblo, the offspring of a marriage between a member and a non-member of the tribe are entitled to tribal membership only if the husband/father is a member. In *Santa Clara Pueblo*, a female member of the tribe sued the tribe, alleging discrimination under the Indian Civil Rights Act, 25 U.S.C. § 1302, when the tribe refused tribal membership to her daughter because she (the mother) had married a non-member.

Executive Order 2141 (1915). However, in 1971, that reservation was revoked under §19 of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. §1618. Whether or not Tyonek had the authority to adopt the 'Family Plan' ordinance in 1965, it no longer has the authority to enforce it.[5]

As the Ninth Circuit clearly stated in *State of Alaska v. Native Village of Venetie:*

> The merits of this action concern whether appellants have jurisdiction to tax appellees' business activities in Native Village. The power to tax "is an inherent and essential part of the authority of any government. The power is therefore an aspect of the retained sovereignty of Indian tribes except where it has been limited or withdrawn by federal authority." F. Cohen, *Handbook on Federal Indian Law* 431 (1982) (footnote omitted). A tribe exercises its sovereign governmental authority within its tribal territory. The governing legal term for tribal territory is "Indian country." *Id.* at 27. Thus, it follows that a tribal tax is only valid within the confines of Indian country.

856 F.2d at 1390

The prohibition against the rental of a home obviously must operate in a particular place. As with the implementation of the tribal tax, that particular place must be in tribal territory (Indian country). The Native Village of

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[5] The district court ruled that Tyonek had the authority to adopt the 'Family Plan' ordinance because it used money it received under 25 U.S.C. §§398a and 398b to construct the houses at issue in this case. Therefore, the district court concluded it was trust money. Appendix B at pages 34-35. The money may have been held in trust by the United States, but at such time as the United States consulted with Tyonek about its expenditure and Congress appropriated it to Tyonek, it no longer was so. See, e.g., *Hydaburg Cooperative Association v. United States*, 667 F.2d 64 (Court of Claims 1981).

Tyonek does not occupy Indian Country. The land upon which the village is located is owned in fee simple by the village and regional for-profit corporations established under §7 and §8 of ANCSA, 43 U.S.C. §§1606-1607, and ANCSA corporation lands are not Indian country. 43 U.S.C. §§ 1601 and 1618. *See Native Village of Stevens v. AMP*, 757 P.2d at 41. As such, Tyonek's authority is *at best* severely limited and certainly does not extend to non-members, especially under the circumstances in this case. To say that Tyonek, being outside of Indian country, may still effectively evict people from the village is flat wrong.[6]

Even if for the sake of argument it is assumed that Tyonek is located on some type of Indian country other than a reservation, it still lacks the authority it asserts in this case. The authority of a village council in off-reservation Indian country is far less than when a reservation is involved. Such limitations have consistently been recognized.

On reservations, the presumption is that tribal governments have exclusive jurisdiction except where Congress has not prohibited state regulation and such regulation does not interfere with tribal government. *See* F. Cohen, *Handbook of Federal Indian Law* Ch. 6 (1982). Outside of reservations, state jurisdiction generally applies to Native people to the same extent as to non-Natives. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145,

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[6] It is wrong enough for the Ninth Circuit to uphold Tyonek's authority to "constructively evict" the Slawsons and the Pucketts from the village by prohibiting them from renting a home in the village. However, the district court (and presumably the Ninth Circuit) have yet to decide the validity of a more egregious ordinance that would *actually* require non-Natives to leave the village after 24 hours. That part of the case was remanded to the district court.

148-159 (1973); *Organized Village of Kake v. Egan*, 360 U.S. 60 (1962); *People of South Naknek v. Bristol Bay Borough*, 466 F. Supp. 870, 877-878 (D. Alaska 1979).

In general, this Court has linked the concept of Indian sovereignty, and thus governmental powers, to the reservation:

> [The Indian sovereignty] doctrine has undergone considerable evolution in response to changed circumstances. As noted above, the doctrine has not been rigidly applied in cases where Indians have left the reservation and become assimilated into the general community. . . . Similarly, notions of Indian sovereignty have been adjusted to take account of the State's legitimate interests in regulating the affairs of non-Indians. . . . Essentially, absent governing Acts of Congress, the question has always been whether the state action infringed on the right of reservation Indians to make their own laws and be ruled by them. . . .
>
> Finally, the trend has been away from the idea of inherent Indian sovereignty as a bar to state jurisdiction and toward reliance on federal pre-emption. . . . The modern cases thus tend to avoid reliance on platonic notions of Indian sovereignty and to look instead to the applicable treaties and statutes which define the limits of state power.[8]

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[8] The extent of federal pre-emption and residual Indian sovereignty in the total absence of federal treaty obligations or legislation is therefore now something of a moot question. Cf. *Organized Village of Kake v. Eagan*, 369 U.S. 60, 62 (1962); Federal Indian Law 846.

McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 171-172 (1973).

In short, the Court will look to specific federal statutes or treaties granting tribal authority or limiting state authority, and the first place it looks is to any authority setting up a reservation. That theme is echoed again and again in other U.S. Supreme Court cases. In *Metlakatla Indian Community v. Egan*, 369 U.S. 45 (1962) and *Organized Village of Kake v. Egan*, 369 U.S. 60 (1962) this Court found federal authority for fish traps in the reservation case (Metlakatla) but found no authority for the traps in the non-reservation villages of Kake and Angoon. The fact that IRA councils existed in those communities provided no basis for exercising authority to sanction fish traps. Likewise, in *Mescalero Apache Tribe v. Jones*, 411 U.S. 145 (1973), this Court held that a specific federal statute barred state taxation of certain off-reservation land leased by a tribe, but there was no bar – in federal statute or Indian sovereignty – to a tax on income derived from the land. The court noted its "repeated statements" that "even on reservations, state law may be applied unless such application would interfere with reservation self-government or would impair a right granted or reserved by federal law." 411 U.S. at 148. In addition, the Court limited the concern for interference with Native self-government to *reservation* self-government:

> Absent express federal law to the contrary, Indians going beyond reservation boundaries have generally been held subject to non-discriminatory state law otherwise applicable to all citizens of the State.

411 U.S. at 148-149.

The ruling in *South Naknek*, cited earlier, was based on the same principle: there is no evidence to suggest that

Congress intended that the multitude of small villages across Alaska have reservation-like governmental authority. Indeed, there is great weight of contrary evidence, particularly ANCSA's revocation of reservation status, its declaration against creating permanent racially-defined institutions, and its requirement of intimate state involvement in the affairs of Native villages and Native corporations.[7] Congress simply did not intend that Native villages in Alaska have governmental powers off-reservation.

On a reservation, which the Native Village of Tyonek is not, the authority to regulate non-members is limited. The clearest statement that a reservation government may not regulate activities of non-members unless it is necessary to protect tribal self-government or to control internal relations is in *Montana v. United States*, 450 U.S. 544 (1981), quoting from *United States v. Wheeler*, 435 U.S. 313 (1978):

> The areas in which such implicit divestiture of sovereignty has been held to have occurred are those involving *the relations between an Indian tribe and nonmembers of the tribe*. . . .
>
> These limitations rest on the fact that the dependent status of Indian tribes within our territorial jurisdiction is necessarily inconsistent with their freedom independently *to determine their external relations*. But the power of self-government, including the power to prescribe and enforce internal criminal laws, are of a different type. They involve *only the relations among members of a tribe*. Thus, they are not such

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[7] See Sections 2 and 19 of ANCSA, 43 U.S.C. §§1601 and 1618.

> powers as would necessarily be lost by virtue of a tribe's dependent status. *Ibid.* (Emphasis added.)

450 U.S. at 564. The court in *Montana* went on to say:

> Thus, in addition to the power to punish tribal offenders, the Indian tribes retain their inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members. *Id.*, at 322, n. 18. But exercise of tribal power beyond what is necessary to protect tribal self-government or to control internal relations is inconsistent with the dependent status of the tribes, and so cannot survive without express congressional delegation. *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 148; *Williams v. Lee*, 358 U.S. 217, 219-220; *United States v. Kagama*, 118 U.S. 375, 381-382; *see McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 171.

450 U.S. at 564.

This Court's prior analysis provides a concise and clear statement on the limitations of a reservation tribe's powers over non-members even on the reservation. The tribe may not regulate non-members beyond what is *necessary* – not merely expedient or useful – to protect self-government, or *necessary* to control internal relations.

In the situation of the Native Village of Tyonek there is no reservation and no Indian country. Thus, there is simply no authority for that off-reservation Native village to legislate rules of conduct affecting non-members on land not owned by the village.

CONCLUSION

For the foregoing reasons, the Ninth Circuit's decision should be reviewed and reversed by this Court. The Petition for a Writ of Certiorari should be granted.

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Supreme Court of the United States

October Term, 1989

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

vs.

NATIVE VILLAGE OF TYONEK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SUPPLEMENTAL BRIEF OF DONALD & ERNA PUCKETT AND FRED & VIRGINIA SLAWSON TO PETITION FOR A WRIT OF CERTIORARI

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January 24, 1990

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NOTICE OF SUPPLEMENTAL DECISION OF THE NINTH CIRCUIT

COME NOW Petitioners Donald and Erna Puckett, by and through their attorneys Jermain, Dunnagan & Owens, P.C., and Petitioners Fred and Virginia Slawson, by and through their attorneys Ashburn & Mason, and supplement their Petition to the Court for a Writ of *Certiorari*, noting a change in the status of the Ninth Circuit decision below (No. 87-3569, No. 87-3587, and No. 87-3588). The Ninth Circuit, since the filing of the Petition for Writ of *Certiorari*, has noted the decision below for publication with the addition of a paragraph regarding the appeal of the Kaloas and Constantines in that action. Copies of the decision noted for publication are attached as Appendix to this supplemental pleading.

RESPECTFULLY SUBMITTED,

JERMAIN, DUNNAGAN & OWENS, P.C.

RANDALL G. SIMPSON
Of Attorneys for Petitioners
Donald and Erna Puckett

ASHBURN & MASON

JULIAN L. MASON
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Fred and Virginia Slawson

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

NATIVE VILLAGE OF TYONEK, *Plaintiff-Appellee,* v. DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON, *Defendants-Appellants.*	No. 87-3569 D.C. No. CV-82-369
NATIVE VILLAGE OF TYONEK, *Plaintiff-Appellant,* v. DONALD PUCKETT; ERNA PUCKETT; ALEXANDER KALOA; ESTER KALOA; FRED SLAWSON; VIRGINIA SLAWSON; ALEC CONSTANTINE; OLGA CONSTANTINE, *Defendants-Appellees.*	No. 87-3587

NATIVE VILLAGE OF TYONEK,
Plaintiff-Appellee,

v.

DONALD PUCKETT, and ERNA PUCKETT; FRED SLAWSON, and VIRGINIA SLAWSON,
Defendants,

and

ALEXANDER KALOA; ESTHER KALOA; ALEC CONSTANTINE; OLGA CONSTANTINE,
Defendants-Appellants.

No. 87-3588

ORDER AND OPINION

Appeal from the United States District Court
for the District of Alaska
James M. Fitzgerald, District Judge, Presiding

Argued and Submitted—January 5, 1988
Submission Vacated November 28, 1988
and Resubmitted August 8, 1989
Seattle, Washington

Memorandum Filed August 11, 1989
Order and Opinion Filed November 24, 1989

Before: Eugene A. Wright, Arthur L. Alarcon and
Cecil F. Poole, Circuit Judges.

Opinion by Judge Alarcon

SUMMARY

Indians

The court amended and ordered published an earlier memorandum disposition, affirming in part and reversing in part a judgment of dismissal. The court held that the district court had subject matter jurisdiction over an Indian village's claims against non-members of the village tribe.

Appellee Native Village of Tyonek instituted an eviction action against non-members of the tribe who had leased members' homes in violation of a local tribal ordinance. The district court dismissed, concluding that it lacked subject matter jurisdiction because the claim merely involved the enforcement of a village ordinance which did not involve federal law. The court also dismissed counterclaims and third-party claims on grounds of sovereign immunity.

[1] The application of a tribal ordinance to non-members of a village presents a federal question because the heart of the controversy over the claim is the village's power, under federal law, to enact its ordinance and apply it to non-Indians. [2] In this case, the Village's power to apply its ordinance requires a showing of its authority, under federal law, to enact and enforce the ordinance against non-members of the village. [3] The defendants, however, lacked standing to cross appeal because they were successful in obtaining a dismissal in the district court. [4] Accordingly, the court reversed the dismissal of the eviction suit but affirmed the dismissal as to the counterclaims and third-party actions.

COUNSEL

Bertram E. Hirsch, Floral Park, New York, for the plaintiff-appellant, Native Village of Tyonek.

Robert H. Wagstaff, Anchorage, Alaska, for the appellants Kaloa and Constantine.

Randall G. Simpson, Jermain, Dunnagan & Owens, Anchorage, Alaska, Lewis F. Gordon, Bailey & Mason, Anchorage, Alaska, for the defendants-appellees and cross-defendants-appellants.

Robert T. Anderson, Native American Rights Fund, Anchorage, Alaska, for amicus curiae, Akiachak Native Community. Douglas K. Mertz, Assistant Attorney General of Alaska, Juneau, Alaska, for amicus curiae, The State of Alaska.

ORDER

The memorandum disposition filed August 11, 1989 is redesignated as an authored opinion by Judge Alarcon.

The published disposition will contain the following additional language, which has been inserted prior to the ultimate paragraph:

> The Kaloas and Constantines have no standing to cross appeal because they were successful in obtaining a dismissal of the complaint in the district court. *See Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) ("successful party below has no standing to appeal from the denial of an injunction"); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981) (a party not aggrieved by the district court's order has no standing to appeal).

The petition for rehearing filed August 29, 1989, in case No. 87-3588 by the Kaloas and the Constantines is denied.

OPINION

ALARCON, Circuit Judge.

The Native Village of Tyonek (Village) instituted this action seeking to evict non-members Donald and Erna Puckett (Pucketts), and Fred and Virginia Slawson (Slawsons), from the village. The Village also sought an order enjoining village members Alexander and Esther Kaloa (Kaloas), and Alec and Olga Constantine (Constantines), from leasing their homes to non-members. The Village alleged that the non-members violated Village Ordinance No. 4 and the members violated Village Ordinance No. 65-32.

The Pucketts and Slawsons filed counterclaims against the Village, and third-party complaints against four officers of the Village Council alleging violations of their constitutional and civil rights. The Kaloas and the Constantines moved to dismiss the Village's complaint. The remaining parties moved for summary judgment.

The district court dismissed the Village's complaint concluding the court lacked subject matter jurisdiction under 28 U.S.C. §§ 1331, 1362 and 28 U.S.C. § 2201 (Supp. IV 1986). The court dismissed the counterclaims and third-party claims concluding that the Village is immune from suit under sovereign immunity, and that the officers are protected by derivative sovereign immunity.

The Village appeals from the dismissal of the complaint. The Pucketts and Slawsons appeal from the dismissal of their counterclaims and third party claims. The Kaloas and Constantines appeal from the dismissal of the Village's complaint against them. This court has jurisdiction over each appeal under 28 U.S.C. § 1291 (1982).

The district court concluded it did not have subject matter jurisdiction over the Village's claims against the Pucketts and

Slawsons because the claims merely involved the enforcement of a village ordinance which did not involve federal law. In so holding the district court relied on the rationale of *Boe v. Fort Belknap Indian Community*, 642 F.2d 276 (9th Cir. 1981) which held that the application of a tribal ordinance did not involve a federal question. However, *Boe* is distinguishable from the present situation because *Boe* involved the application of the ordinance exclusively to tribal members.

[1] Significantly, the Village's claims against the Pucketts and Slawsons involve the application of the village ordinance to non-members of the Tyonek village. The rule concerning the application of a tribal ordinance to non-members of a village is expressed in *Chilkat Indian Village v. Johnson*, 870 F.2d 1469, 1475 (9th Cir. 1989). In *Johnson*, the Chilkat village council sought damages from non-member defendants who removed Chilkat artifacts in contravention of a Chilkat village ordinance. The district court dismissed on jurisdictional grounds. We reversed the dismissal of the claim of the Chilkat Village Council. We held that the district court had subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1362. *Johnson*, at 1473. We concluded a federal question existed because "the heart of the controversy over the claim will be the Villages's power, under federal law, to enact its ordinance and apply it to non-Indians." *Johnson*, at 1473.

[2] A similar question is presented in this case. The Village of Tyonek is attempting to apply its ordinance to non-members of the Tyonek village. Pursuant to Ordinance No. 4, the Village is attempting to bar non-members from staying in the village for any period longer than 24 hours unless they receive the Village's permission to remain. As in *Johnson*, the Village's power to apply this ordinance will require a showing of its authority, under federal law, to enact and enforce this ordinance against non-members of the village. *Johnson*, at 1474.

[3] The Kaloas and Constantines have no standing to cross appeal because they were successful in obtaining a dismissal

of the complaint in the district court. *See Public Service Comm'n v. Brashear Freight Lines, Inc.*, 306 U.S. 204, 206 (1939) (per curiam) ("successful party below has no standing to appeal from the denial of an injunction"); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1343 (9th Cir. 1981) (a party not aggrieved by the district court's order has no standing to appeal).

[4] Accordingly we REVERSE the dismissal of the Village's claims against the Pucketts and Slawsons and REMAND those claims to district court. The remaining portion of the district court's judgment is AFFIRMED.

Supreme Court, U.S.
FILED
AUG 13
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-609 (5)

In the Supreme Court of the United States

OCTOBER TERM, 1990

DONALD PUCKETT, ET AL., PETITIONERS

v.

NATIVE VILLAGE OF TYONEK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTIONS PRESENTED

1. Whether respondent Native Village of Tyonek, an Alaska Native Village exercising self-governing powers under a constitution adopted pursuant to Section 16 of the Indian Reorganization Act, 25 U.S.C. 476, is immune from the counterclaims in this civil action under the doctrine of tribal sovereign immunity.

2. Whether the Village's immunity from suit was abrogated by Congress when it enacted the Alaska Native Claims Settlement Act, 43 U.S.C. 1601 *et seq.*, or the Indian Civil Rights Act, 25 U.S.C. 1301 *et seq.*

3. Whether the Village waived its immunity to the counterclaims, either by a "sue or be sued" clause in the corporate charter it was issued under Section 17 of the Indian Reorganization Act, 25 U.S.C. 477, or by filing its complaint in this civil action.

4. Whether derivative immunity bars petitioners' third-party claims against the officers of the Village in connection with their enforcement of a Village ordinance providing that, without the consent of the Village Council, housing built with tribal trust funds may not be leased or alienated to persons who are not members of the Village.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

No. 89-609

DONALD PUCKETT, ET AL., PETITIONERS

v.

NATIVE VILLAGE OF TYONEK, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

INTEREST OF THE UNITED STATES

This brief is filed in response to the Court's invitation to the Solicitor General to file a brief expressing the views of the United States.

STATEMENT

1. The Village of Tyonek, on the northwest shore of Cook Inlet, has been inhabited by Tanana Indians since as early as the eighteenth century, when the first white settlers arrived in Alaska. Pet. App. 8, 10. In 1915, President Wilson issued an executive order withdrawing 25,000 acres surrounding the Village, which became known as the Moquawkie Reservation. Executive Order No. 2141 (Feb. 27, 1915); Pet. App. 8, 10. The area was set aside for the purpose of "aiding the natives to practice self-support and industry" and preventing them from being "hemmed in by white intrusion." Letter from Comm'r of Educ. Tallman to Sec'y of the Interior (Feb. 23, 1915) reprinted in *Oil and Gas Leasing*

on Lands Withdrawn by Executive Order for Indian Purposes in Alaska, 70 Interior Dec. 166, 175-176 (1963).

In 1939, the Natives living in the Village adopted a constitution and bylaws under Section 16 of the Indian Reorganization Act of 1934 (IRA), 25 U.S.C. 476, and a corporate charter under Section 17 of the Act, 25 U.S.C. 477. Both were approved by the Secretary of the Interior. Pet. App. 11. Section 16(e) of the IRA provides that the constitution adopted by an Indian tribe shall vest in the tribe or its council the power, *inter alia*, "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe." The constitution of the Native Village of Tyonek lists among its powers the rights to "deal with the Federal and Territorial Governments," "stop any giving or taking away of Village lands or other property without its consent," "control the use by members and nonmembers of any reserve set aside by the Federal Government for the Village and to keep order in the reserve," and "guard and * * * foster native life, arts and possessions and native customs not against law." Tyonek Const. Arts. I, IV (Supp. C.R. 46, Exh. B, at 1, 2).[1]

In the mid-1960s, the Secretary of the Interior, with the consent of the Village Council as required by 25 U.S.C. 398 and 398a, granted oil and gas leases covering a portion of the Reservation. Pet. App. 12; *Fondahn* v. *Native Village of Tyonek*, 450 F.2d 520, 521 (9th Cir. 1971). Under 25 U.S.C. 398b, the proceeds of such leases on an Executive Order Indian Reservation must be deposited in the Treasury to the credit of the "tribe of Indians" for whose benefit the reservation was established and must thereafter be available for the "use and benefit of such Indians." In this case, a portion of the lease proceeds was used to build 60 houses in the Village to help solve a housing shortage. The Tyonek Council established a "Family Plan" for this purpose, under which families comprised of Village members could obtain the construction and furnishing of a house at the Village's

[1] "Supp. C.R." refers to Appellants' Supplement to the Excerpts of the Clerk's Record in the court of appeals.

expense. Pet. App. 12. While the houses were being constructed, the Council passed Village Ordinance No. 65-32, which provides in pertinent part (*ibid.* (emphasis omitted)):

> [T]he interests of members of the Village in houses which are acquired by such members by virtue of the Family Plan of the Village cannot be sold, conveyed, leased, mortgaged, or otherwise alienated by any member of the Village to a person, corporation, or other legal entity which or who is not a[n] enrolled member of the Village of Tyonek, Alaska.

2. The Moquawkie Reservation, along with all other reservations in Alaska save one, was revoked by Section 19(a) of the Alaska Native Claims Settlement Act (ANCSA), 43 U.S.C. 1618(a). The surface estate in former Reservation land was conveyed to the for-profit Tyonek Native Corporation, pursuant to Section 14(a) of ANCSA, while the subsurface estate was conveyed to the Cook Inlet Regional Corporation, pursuant to Section 14(f). 43 U.S.C. 1613(a) and (e), 43 U.S.C. 1606(a); Pet. App. 14. ANCSA did not purport to affect the Village's governing powers, its ordinances, or other measures, such as the Family Plan. Pet. App. 14.

3. Petitioners are nonmembers of the Village who desired to rent Family Plan units from Village members. The Pucketts, who had been living at a nearby timber camp, requested and were granted permission by the Village Council to lease one unit from October 1981 through May 1982, in order to enable their children to complete the school year at the Village school. The Village President, Donald Standifer, informed the Pucketts in April and June 1982 that their authorization to lease the unit expired at the end of the school year, but the Pucketts refused to vacate the premises and signed a lease for another year. The Slawsons requested permission to reside in another Family Plan unit, but their request was denied by the Council. The Slawsons nevertheless signed a lease and moved into the unit. Pet. App. 15-16.

4. The Village of Tyonek initiated this action in 1982 to evict the Pucketts and the Slawsons from the Family Plan units and to enjoin the lessors, who are members of the Village, from leasing their units to nonmembers. The Village sought to enforce both

Ordinance No. 65-32 and Village Rule No. 4. The latter provision was adopted by the Village Council in 1942 and prohibits any "white men" (other than government employees) from remaining in the Village more than twenty-four hours and from bringing liquor into the Village. Pet. App. 11, 16. Although Rule No. 4 uses the term "white men," the Village introduced an affidavit of Village President Standifer that described Rule No. 4 as applying to "nonmembers of the Tribe" (Supp. C.R. 50, Exh. A, at 23-24), and the district court and court of appeals both apparently understood the Rule to apply to "nonmembers." Pet. App. 4, 9, 11, 23 n.11; cf. *Wilson* v. *Omaha Indian Tribe*, 442 U.S. 653, 666-669 & n.16 (1979) (discussing 25 U.S.C. 194, which imposes burden of proof on "white person" in property dispute with Indians); 442 U.S. at 679-681 (Blackmun, J., concurring).

Petitioners counterclaimed against the Village and filed third-party claims against four Village officers (the president, vice president, secretary-treasurer and Village administrator), seeking declaratory and injunctive relief as well as compensatory and punitive damages. Petitioners alleged that the enforcement of Ordinance No. 65-32's restriction on leases to nonmembers constituted unlawful discrimination on the basis of race, in violation of the Fourteenth Amendment and various civil rights statutes: 42 U.S.C. 1981, 1982, 1983 and 1985; the Fair Housing Act of 1968, 42 U.S.C. 3604 and 3617; the Indian Civil Rights Act, 25 U.S.C. 1302(a); and state housing discrimination laws. Pet. App. 23-24 n.12.

In an unpublished bench opinion, the district court dismissed all of the parties' claims. Pet. App. 7-36. In doing so, the court addressed the validity of Ordinance No. 65-32, *id.* at 32-35 (see page 7, *infra*), but it stated that petitioners' counterclaims and third-party claims were not based upon alleged attempts by the Village or its officers to enforce Rule No. 4 and that it therefore was not deciding the validity of that provision. *Id.* at 23 n.11.

The district court dismissed the Village's complaint for lack of subject matter jurisdiction, because, in the court's view, the Village's suit to enforce its own laws (Ordinance No. 65-32 and Rule No. 4) did not "arise under" federal law for purposes

of 28 U.S.C. 1331 or 1362. Pet. App. 17-22. The district court dismissed petitioners' counterclaims on the ground that the Village is immune from suit by virtue of tribal sovereign immunity. *Id.* at 23-32. And it dismissed the third-party claims against the Village officers on the ground that they were barred by derivative immunity because the officers' enforcement of Ordinance No. 65-32 was within the scope of their official authority. *Id.* at 32-35. On this issue, the court reasoned that whether the Village officers possess derivative immunity depends on whether the Village itself had the governmental authority to adopt Ordinance No. 65-32 to exclude nonmembers from Family Plan housing. The court concluded that it did. It pointed out that "by the express terms of [25 U.S.C.] 398b, the funds obtained from Tyonek's oil and gas leases were held in trust for members of the Village alone." Pet. App. 35. The court found it "completely logical, therefore, for Tyonek to use those funds in 1965 to build housing for Village members only, and to attempt to restrict the extent to which these houses would benefit or be used by non-members of Tyonek." *Ibid.*

5. In a brief opinion, the court of appeals reversed the dismissal of the Village's complaint, finding that its suit to enforce Ordinance No. 65-32 and Rule No. 4 against petitioners does arise under federal law; the court therefore remanded the Village's claims to the district court. Pet. App. 1-5. Petitioners do not challenge that ruling here. In a single sentence at the conclusion of its opinion, *id.* at 5, the court of appeals, without elaboration, affirmed the remaining portions of the district court's judgment, which included the dismissal of petitioners' counterclaims and third-party claims.[2]

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[2] The court of appeals amended its opinion on November 24, 1989, to add a paragraph stating that the Kaloas and Constantines, the Village members who leased their Family Plan units to petitioners and who are defendants in the Village's principal action, did not have standing to appeal the district court's dismissal of the Village's complaint against them. See Pet. Supp. Br. App. at 13900-13901. The Kaloas and Constantines filed a petition for a writ of certiorari seeking review of that ruling, *Kaloa* v. *Native Village of Tyonek*, No.

DISCUSSION

Petitioners seek review of the court of appeals' summary affirmance of the district court's unpublished decision dismissing their claims against the Village and the Village officers. That decision, however, is correct, does not conflict with any decision of this Court or of another court of appeals, and presents no issue warranting review by this Court.

1. Although the legal issues presented at this stage of the case concern immunity from suit, the underlying dispute centers on Village Ordinance No. 65-32. That Ordinance provides that housing constructed with the tribal trust funds that were derived from oil leases on the Moquawkie Reservation before the Reservation was revoked, may not be leased to nonmembers without the consent of the Village Council. We agree with the district court that Ordinance No. 65-32 is a valid implementation of 25 U.S.C. 398b, which provides that the proceeds of leasing of an Executive Order Reservation set aside for a "tribe of Indians" are to be devoted to the "use and benefit of such Indians." Restrictions of this sort based on tribal membership, especially when congressionally authorized and related to the use of tribal property, do not constitute prohibited discrimination on the basis of race. *Duro* v. *Reina*, 110 S. Ct. 2053, 2063 (1990); *Washington* v. *Yakima Indian Nation*, 439 U.S. 463, 500-501 (1979); *United States* v. *Antelope*, 430 U.S. 641, 646 (1977); *Fisher* v. *District Court*, 424 U.S. 382, 390-391 (1976); *Morton* v. *Mancari*, 417 U.S. 535 (1974).

Conversely, as amicus State of Alaska recognizes (Br. 6 n.6), neither court below passed upon the validity of Village Rule No. 4, because the district court understood that Rule to be at issue only in the Village's principal action against petitioners (which has been remanded to the district court for further proceedings), not in petitioners' counterclaims and third-party claims, at issue here. Accordingly, even if we assume (contrary to the inter-

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89-1358. The Court denied their petition on April 16, 1990. 110 S. Ct. 1812 (1990).

When the court of appeals amended its opinion, it also designated the opinion for publication. See 890 F.2d 1054 (19[illegible]).

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pretation apparently given to the Rule by the Village and both courts below) that Rule No. 4's reference to "white men" is not to be understood as merely a short-hand reference to nonmembers of the Village, this case does not present the primary issue petitioners seek to have resolved: whether Tyonek may "exclude Petitioners from Tyonek, Alaska, on the basis of their race" (Pet. i). For these reasons, the setting of this case would not, in our view, render it a suitable vehicle for consideration of the various issues petitioners seek to raise concerning the application of civil rights statutes to Indian Tribes—even if those issues otherwise warranted review.

Moreover, the interaction of the civil rights laws with the traditional independent and sovereign powers of Indian Tribes has been the subject of considerable review by other departments of government in recent years. The Commission on Civil Rights has undertaken a thorough study of the enforcement of the Indian Civil Rights Act (ICRA), including a series of extensive field hearings,[3] and we have been informed by the Commission that its final report on that subject is now being prepared. The Senate Select Committee on Indian Affairs conducted hearings on the same subject during the last Congress.[4] And a bill has been introduced in this Congress that would authorize suits against Indian Tribes and tribal officers for injunctive or other equitable relief (but not money damages) to secure compliance with the Indian Civil Rights Act. S. 517, 101st Cong., 1st Sess. (1989). The bill would expressly waive the sovereign immunity of Tribes to those suits, but would require exhaustion of tribal remedies before such a suit could be brought. The effect of the bill, if enacted, would be to allow (albeit under special procedures) certain of the suits that this Court held in *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49 (1978), are not authorized under the ICRA as it now reads.

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[3] *Hearings Before the United States Comm'n on Civil Rights Enforcement of the Indian Civil Rights Act* (1986-1988) (5 vols.).

[4] *Tribal Court Systems and Indian Civil Rights Act: Hearing Before the Senate Select Comm. on Indian Affairs*, 100th Cong., 1st Sess. (1988).

In these circumstances, it would, in our view, be appropriate to defer to the legislative process to resolve the difficult questions of how civil rights are best defined, enforced and remedied in this setting, rather than to grant petitoners' request for a judicial overruling of *Martinez* or dilution of settled immunity doctrines in order to achieve the same end. In this case, the lower courts' rulings on those issues are fully consistent with this Court's precedents, and present no occasion for further review.

2. The district court held, based upon "Tyonek's history and the manner in which the federal government has dealt with Tyonek," that the Village possesses sovereign immunity from suit in the same manner as other Indian Tribes. Pet. App. 24. That holding is correct, especially in the context of this case. The sovereign immunity of Indian Tribes "is a necessary corollary to Indian sovereignty and self-governance," *Three Affiliated Tribes* v. *Wold Engineering*, 476 U.S. 877, 890 (1986), and it has been repeatedly recognized by this Court. See *id.* at 890-891; *Santa Clara Pueblo*, 436 U.S. at 58-59; *Puyallup Tribe* v. *Washington Dep't of Game*, 433 U.S. 165, 172-173 (1977); *United States* v. *U.S. Fidelity & Guaranty Co.*, 309 U.S. 506, 512-513 (1940); *Turner* v. *United States*, 248 U.S. 354, 358 (1919). We discuss the origins and purposes of this rule in our amicus brief (at 7-9) filed in response to the Court's invitation in *Oklahoma Tax Commission* v. *Citizen Band Potawatomi Indian Tribe*, petition for cert. pending, No. 89-1322, and there is no need to repeat that discussion here. Petitioners in fact do not challenge this basic rule. Instead, they argue that it should not be applied in this case. None of the reasons they advance has merit.

a. Petitioners first contend (Pet. 13-17) that historical differences between the Nation's treatment of Alaskan Natives and its treatment of Natives in the contiguous 48 States justify a finding that Alaska Native villages like Tyonek are not entitled to immunity. While the history of federal Indian policy in Alaska is to some extent unique, the conclusion urged by petitioners does not follow. That Alaska Native Villages may be self-governing

tribes, akin to those in the continental United States,[5] has been recognized by Executive action, Legislative enactment and judicial precedent for more than one hundred years. It is important to stress, however, that this case involves only the question of the Village's sovereign immunity to suit as a procedural matter. A finding of such immunity does not resolve the distinct question of the scope of the Village's powers of self-government as a substantive matter.

Article III of the 1867 Treaty of Cession (Treaty of March 30, 1867, 15 Stat. 542) provided:

> The uncivilized tribes [of Alaska] will be subject to such laws and regulations as the United States may, from time to time, adopt in regard to aboriginal tribes of that country.

This provision was interpreted in *In re Minook*, 2 Alaska 200, 221 (D. Alaska 1904), as giving "the Indian tribes of Alaska the same status before the law as those of the United States." A 1923 opinion of the Interior Solicitor, dealing specifically with the Village of Tyonek, similarly concluded that "[t]he relations existing between [the Alaska Natives] and the Government are very similar and in many respects identical with those which have long existed between the Government and the aboriginal peoples residing within the territorial limits of the Unites States." *Leasing of*

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[5] The organization of Alaska Natives along village rather than tribal lines is not unique. See *Washington* v. *Washington State Commercial Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 664 & n.5 (1979) (noting that some Northwest Indians entitled to treaty fishing rights had lived in "loose bands" that were organized into "tribes" by the government agents who negotiated the treaties); see also *Puget Sound Gillnetters Ass'n* v. *United States District Court*, 573 F.2d 1123, 1127 n.2 (9th Cir. 1978) (while "questionable * * * whether the collections of villages Governor Stephens made for purposes of his negotiations were in fact tribes," court treated them as sovereign entities); cf. *United States* v. *Sandoval*, 231 U.S. 28, 39 (1913) (Pueblo Indians treated like other Indian tribes, despite fact that they are "sedentary rather than nomadic" and live on lands held in communal, fee simple ownership). Thus, a village can be a tribe in the legal sense of being a self-governing Indian community. See D. Case, *Alaska Native and American Laws* 436 (1984) ("[u]nless law is simply a word game, whether a Native community exercises powers of self-government should not turn on whether it is described as a 'tribe,' a 'village' or something else").

Lands Within Reservations Created for the Benefit of the Natives of Alaska, 49 Pub. Lands Dec. 592, 593 (1923). Accord *Status of Alaskan Natives*, 53 Interior Dec. 593 (1932). And a 1932 Solicitor's Opinion concluded that marriage among Alaska Natives maintaining their tribal relations should be governed by the laws and customs of the Alaska Native tribes. *Validity of Marriage By Custom Among the Natives Or Indians of Alaska*, 54 Interior Dec. 39, 46 (1932).

The Indian Reorganization Act (IRA), 25 U.S.C. 461 *et seq.*, was amended by the Act of May 1, 1936, ch. 254, § 1, 49 Stat. 1250 (25 U.S.C. 473a), in order to permit "groups of Indians in Alaska not [heretofore] recognized as bands or tribes, but having a common bond of occupation, or association, or residence within a well-defined neighborhood, community, or rural district" to adopt constitutions and bylaws and receive charters of incorporation under Sections 16 and 17 of the IRA, 25 U.S.C. 476, 477. Many Native Villages in Alaska, including Tyonek, took advantage of these provisions to reorganize their existing governments to carry on municipal activities and business affairs more effectively. See F. Cohen, *Handbook of Federal Indian Law* 751 (1982).

In recent enactments, Congress has again treated Alaska Native Villages such as Tyonek as self-governing tribes. For instance, under Sections 103(8), 108, and 109 of the Indian Child Welfare Act of 1978, 25 U.S.C. 1903(8), 1918, and 1919, any Alaska Native Village may obtain retrocession of jurisdiction over Indian child welfare cases and may negotiate jurisdictional arrangements with the state. Congress in 1982 made revenue sharing grants available to any "Alaskan native village that carries out substantial governmental duties and powers." 31 U.S.C. 6701(a)(5)(B) (repealed April 7, 1986, Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. No. 99-272, § 14001(a)(1), 100 Stat. 327). Moreover, the Indian Civil Rights Act, which petitioners invoke (Pet. 8, 25-26), imposes restrictions only on an "Indian tribe in exercising [its] powers of self-government." 25 U.S.C. 1302. Petitioners cannot both claim the protection of that Act and deny the existence of the Village as such a Tribe.

The courts, too, have treated Alaska Natives as subject to many of the same rules that apply to Indians in the lower States. For instance, in *Tee-Hit-Ton Indians* v. *United States*, 348 U.S. 272, 285-286 (1955), this Court rejected the argument that the nature of Indian landholding in Alaska, which it described as "tribal," was significantly different from that of Tribes elsewhere in the United States. See also *Alaska Chapter, Associated Gen'l Contractors* v. *Pierce*, 694 F.2d 1162, 1169 n.10 (9th Cir. 1982) ("Alaskan Natives, including Eskimos and Aleuts, have been considered to have the same status as other federally recognized American Indians."); *Petition of McCord*, 151 F. Supp. 132, 135 (D. Alaska 1957) ("[t]he prosecution's argument that Alaska natives have a different status than Indians of the States is a rather novel concept which I regard as inaccurate"). Correspondingly, courts have recognized the applicability of the doctrine of tribal immunity to self-governing Alaska Native Villages. See *Cogo* v. *Central Council of Tlingit and Haida Indians*, 465 F. Supp. 1286 (D. Alaska 1979); *Johnson* v. *Chilkat Indian Village*, 457 F. Supp. 384, 387 (D. Alaska 1978); *Atkinson* v. *Haldane*, 569 P.2d 151 (Alaska 1977).

The Alaska Supreme Court, in a sharply divided opinion, has held that the Native Village of Stevens does not enjoy sovereign immunity. *Native Village of Stevens* v. *Alaska Management & Planning*, 757 P.2d 32 (Alaska 1988). But as the dissent in *Stevens* correctly observed, 757 P.2d at 44, the majority placed undue emphasis on the facts that Alaska Natives do not reside on reservations and are generally subject to state law. Those factors should not preclude immunity, so long as a Native Village is in fact a self-governing body. In *Puyallup*, for example, the Tribe was held to be protected by sovereign immunity even as to matters arising off reservation. 433 U.S. at 167, 171.[6] In any event, the

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[6] See also *United States* v. *Sandoval*, 231 U.S. 28, 46 (1913) (federal Indian liquor laws apply to Pueblo Indian communities occupying lands owned in unreserved, communal fee title); *Jones* v. *Meehan*, 175 U.S. 1, 29 (1899) (tribe retains authority over inheritance of non-reservation, non-trust property); *Three Affiliated Tribes II*, 476 U.S. at 892 (state jurisdiction over an Indian tribe is not inconsistent with tribal sovereign immunity); *U.S. Fidelity &*

majority in *Stevens* expressly recognized that the district court's decision in the instant case was distinguishable based upon what it termed the "unique" history of Tyonek, because the Village occupied a Reservation at the time it adopted a constitution and by-laws under the IRA. 757 P.2d at 35-36 n.4. That point has particular significance here, because the housing that is the subject of the suit was constructed with funds derived from the leasing of the Reservation before it was revoked. Accordingly, even if the question of the immunity of other Alaska Native Villages might at some time warrant review by this Court, the decision below presents no conflict with rulings by the Alaska courts in the circumstances of this case.

b. Petitioners next contend (Pet. 17, 25) that ANCSA and the ICRA "extinguished" or waived the Village's sovereign immunity. While Congress may waive a tribe's sovereign immunity, such a waiver "cannot be implied but must be unequivocally expressed." *Santa Clara Pueblo* v. *Martinez*, 436 U.S. 49, 58 (1978). As the district court correctly pointed out, ANCSA "did not expressly change the status of Tyonek or its IRA Village government." Pet. App. 14. By contrast, ANCSA did explicitly extinguish aboriginal hunting, fishing and land rights. Although ANSCA's revocation of Tyonek's reservation may affect the extent of the Village's political authority over its former Reservation lands, see, *e.g.*, *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962), neither reservation status nor land ownership is an absolute prerequisite for the existence of Native self-governance—or, in particular, tribal sovereign immunity. See note 6, *supra*.[7]

Guaranty Co., 309 U.S. at 512 (immunity exists "even after dissolution of the tribal government"); *Bottomly* v. *Passamaquoddy Tribe*, 599 F.2d 1061, 1064-1066 (1st Cir. 1979); *Haile* v. *Saunooke*, 246 F.2d 293 (4th Cir. 1957).

[7] Congress amended ANCSA in 1988 to permit the shareholders of ANCSA corporations to decide whether to continue restrictions on alienation of corporation stock. Alaska Native Claims Settlement Act Amendments of 1987, Pub. L. No. 100-241, § 2, 101 Stat. 1788. Section 2(8) of the Amendments, 101 Stat. 1789, 43 U.S.C. 1601, states that no provision of the Act shall "confer on, or deny to, any Native organization any degree of sovereign governmental authority over lands (including management, or regulation of the taking, of fish and wildlife) or persons in Alaska." The legislative history indicates that Congress was aware of the controversy over whether there are tribal entities

Petitioners' alternative argument that the ICRA waived tribal sovereign immunity has already been rejected in *Santa Clara Pueblo*, 436 U.S. at 59, where this Court, after finding no "unequivocal expression of contrary legislative intent," concluded that "suits against the tribe under the ICRA are barred by its sovereign immunity from suit."[8] Petitioners' reliance on *Dry Creek Lodge, Inc.* v. *Arapahoe & Shoshone Tribes*, 623 F.2d 682 (10th Cir. 1980), cert. denied, 449 U.S. 1118 (1981), is misplaced. The majority opinion in *Dry Creek Lodge* found that the ICRA waived immunity in a suit against a tribe by non-Indians who had no remedy within the tribal courts. As the district court pointed out (Pet. App. 29-32), *Dry Creek Lodge* is plainly inconsistent with *Santa Clara*. Nothing in *Santa Clara* limits a tribe's sovereign immunity to suits arising from intra-tribal disputes. To the contrary, this Court supported its sovereign immunity holding in *Santa Clara* by relying on earlier decisions that did not involve intra-tribal disputes. See 436 U.S. at 58 (citing *Puyallup*, 433 U.S. at 172-173, and *U.S. Fidelity & Guaranty Co.*, 309 U.S. at 512-513). Furthermore, *Dry Creek Lodge* rests on the spurious premise that "[t]here has to be a forum where the dispute can be settled." 623 F.2d at 685. The very purpose of sovereign immunity is to protect the sovereign against suits in *any* court, unless immunity has been waived.

The Ninth Circuit has rejected the analysis of *Dry Creek Lodge* as inconsistent with *Santa Clara Pueblo*. See *R.J. Williams Co.* v. *Fort Belknap Housing Authority*, 619 F.2d 979, 981 (1983). The importance of this circuit conflict is minimal, however, because the Tenth Circuit has studiously avoided following *Dry Creek Lodge* by giving that case an extremely narrow reading. See, *e.g.*, *Nero* v. *Cherokee Nation*, 892 F.2d 1457, 1460 (10th Cir. 1989)(*Dry Creek Lodge* exception is "narrowly construed"); *Seneca-Cayuga Tribe* v. *State ex rel. Thompson*, 874 F.2d 709,

in Alaska that can exercise governmental authority over lands or persons, and determined to leave that issue "to the courts." S. Rep. No. 201, 100th Cong., 1st Sess. 23 (1987).

[8] Petitioners do not argue that tribal sovereign immunity was waived by Congress when it enacted 42 U.S.C. 1981, 1982, 1983, or the Fair Housing Act, 42 U.S.C. 3610(d).

715 n.6 (10th Cir. 1989) ("*Dry Creek Lodge* was based on highly unusual circumstances"); *White* v. *Pueblo of San Juan*, 728 F.2d 1307, 1312 (10th Cir. 1984) ("*Dry Creek* opinion must be regarded as requiring narrow interpretation in order to not come into conflict with the decision of the Supreme Court in *Santa Clara*."); *Ramey Constr. Co.* v. *Apache Tribe of the Mescalero Reservation*, 673 F.2d 315, 319 n.4 (10th Cir. 1982) (same).

Moreover, even if the *Dry Creek Lodge* exception could somehow be reconciled with *Santa Clara Pueblo*, petitioners could not bring themselves within it, because (1) enforcement of Ordinance 65-32's requirement—that tribal members lease their Family Plan housing units only to other tribal members—would appear to relate primarily to "internal tribal issues," *Nero*, 892 F.2d at 1460, and (2) the Village did afford petitioners a forum for relief, *id.* at 1460 n.5, since the Village Council may grant permission to lease to nonmembers and the Pucketts in fact were granted such permission. There is, accordingly, no conflict between the decision below and *Dry Creek Lodge* warranting review by this Court.[9]

c. As explained in our amicus brief in *Potawatomi*, 89-1322 U.S. Amicus Br. at 9-10, petitioners' argument that the Village waived its immunity to the counterclaims and cross-claims (Pet. 25) by filing its principal action against petitioners is wrong and was rejected in *U.S. Fidelity and Guaranty Co.*, 309 U.S. at 513.[10] Nor are petitioners correct in contending (Pet. 24) that the Village consented to this suit by adopting a corporate charter with a "sue and be sued" clause. Section 16 of the IRA authorizes tribes to organize a constitutional entity, while Section 17 authorizes

[9] In *Dry Creek Lodge* itself, the United States filed an amicus brief in this Court at the petition stage urging the Court to grant the Tribe's petition and summarily reverse the Tenth Circuit's decision because it was so clearly inconsistent with *Santa Clara Pueblo*. See 80-613 U.S. Amicus Br. at 9. The Court denied the petition, over three dissents. Because *Dry Creek Lodge* has been effectively confined to its facts by the Tenth Circuit, and because the decision below is clearly correct under *Santa Clara Pueblo*, we do not believe that the immunity issue warrants review here.

[10] As respondents properly concede (Br. in Opp. 25 n.5), petitioners' contentions regarding the invalidity of the Village ordinances can be raised as a defense to the eviction action, should the Village pursue that action on remand.

organization of a corporate entity. The courts have recognized that these two entities are distinct, and that a consent to suit clause in a corporate charter in no way waives the sovereign immunity of a tribe as a constitutional entity. *Seneca-Cayuga Tribe*, 874 F.2d at 715 n.9; *Ramey Constr.*, 673 F.2d at 320; *Kenai Oil & Gas, Inc.* v. *Department of the Interior*, 522 F. Supp. 521 (C.D. Utah 1981), aff'd and remanded, 671 F.2d 383 (10th Cir. 1982); *Gold* v. *Confederated Tribes*, 478 F. Supp. 190, 196 (D. Ore. 1979); *Atkinson* v. *Haldane*, 569 P.2d 151 (Alaska 1977); but see *Martinez* v. *Southern Ute Tribe*, 150 Colo. 504, 374 P.2d 691 (1962).

Petitioners' reliance (Pet. 24) on *Fontenelle* v. *Omaha Tribe*, 430 F.2d 143 (8th Cir. 1970), is misplaced. That decision did not consider the distinction between the tribe's constitutional entity and its corporate entity. In a later decision, the Eighth Circuit made clear that a consent to suit clause in a Section 17 corporate charter does not waive immunity for actions taken pursuant to a tribe's constitution. *American Indian Agricultural Credit Consortium* v. *Standing Rock Sioux Tribe*, 780 F.2d 1374, 1379-1380 (8th Cir. 1985).[11]

3. Finally, petitioners briefly challenge (Pet. 27-29) the district court's holding that because their claims against the Village are barred by tribal sovereign immunity, their claims against the Village officers in their official capacities based on their enforcement of Ordinance 65-32 are barred by derivative immunity. Pet. App. 32-35.[12] Contrary to petitioners' contention, the courts below correctly disposed of this issue.

The courts have frequently described tribal sovereign immunity as "co-extensive with that of the United States." See, *e.g.*, *Kennerly* v. *United States*, 721 F.2d 1252, 1258 (9th Cir. 1983);

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[11] *Parker Drilling Co.* v. *Metlakatla Indian Community*, 451 F. Supp. 1127 (D. Alaska 1978), also cited by petitioners (Pet. 24), likewise recognizes the distinction between the entities.

[12] The portion of the petition discussing petitioners' claims against the Village officers indicates that petitioners are pursuing those claims only in the latter's official capacities, since it is devoted almost entirely to a discussion of the Village's authority to adopt the ordinance the officers enforced. See Pet. 27-29. If the Village officers were sued in their personal capacities, questions of qualified immunity would also arise.

Jicarilla Apache Tribe v. *Andrus*, 687 F.2d 1324, 1344 (10th Cir. 1982). Derivative immunity for officers acting within the scope of their duties is an essential component of sovereign immunity, because judgments against the officers may interfere with public administration or expend themselves against the public treasury. See *Dugan* v. *Rank*, 372 U.S. 609, 620-621 (1963); *Larson* v. *Domestic & Foreign Commerce Corp.*, 337 U.S. 682, 687-688 (1949).

The Court's statement in *Santa Clara Pueblo* that one of the officers of the Pueblo was "not protected by the Tribe's immunity from suit," 436 U.S. at 59, therefore must be understood to mean that the officer did not have the *absolute* immunity of the Tribe. This is evident from the Court's citation, *ibid.*, to *Ex parte Young*, 209 U.S. 123 (1908), which accepts the proposition that state officers have derivative immunity from suits brought against them in their official capacities, but concludes that a suit challenging the constitutionality of an officer's actions in enforcing a state law is not one against the State for purposes of the Eleventh Amendment. "The theory of *Young* was that an unconstitutional statute is void, *id.* at 159, and therefore does not 'impart to [the official] any immunity from responsibility to the Supreme authority of the United States.' " *Green* v. *Mansour*, 474 U.S. 64, 68 (1985), quoting 209 U.S. at 160. Accordingly, the lower courts have recognized that derivative tribal immunity "extends to tribal officials when acting in their official capacity and within the scope of their authority." *United States* v. *Oregon*, 657 F.2d 1009, 1012 n.8 (9th Cir. 1981); see also *Oklahoma ex rel. Oklahoma Tax Comm'n* v. *Graham*, 822 F.2d 951, 956-957 (10th Cir. 1987), rev'd on other grounds, 109 S. Ct. 1519 (1989); *Hardin* v. *White Mountain Apache Tribe*, 779 F.2d 476, 479-480 (9th Cir. 1985).

Petitioners appear to accept the proposition that tribal officers acting within the scope of their authority are generally protected by the Tribe's immunity when sued in their official capacity, but they contend (Pet. 27) that the tribal officers in this case "exceeded the permissible scope of their authority as [Village]

officers."[13] There can be no serious contention that the district court erred in finding that the four named Tyonek officers were acting within the scope of authority delegated to them by the Village when they enforced Ordinance No. 65-32. Pet. App. 33. Rather, the thrust of petitioners' argument seems to be that the Ordinance restricting Family Plan housing units to members of the Village is void because it was beyond the *Village's* authority to adopt. This claim is insubstantial.

The district court correctly pointed out (Pet. App. 34-35) that the statute that authorized the oil and gas leasing on the Reservation, the proceeds of which were used to build the Family Plan housing, clearly contemplated that the proceeds should be used to benefit "the tribe of Indians for whose benefit the reservation or withdrawal was created." 25 U.S.C. 398b. Tyonek, which was a reservation Tribe when the Ordinance was passed in 1965, clearly was authorized to take necessary measures to assure that the housing built with the lease proceeds continued to benefit tribal members. Moreover, Section 16 of the Indian Reorganization Act provides that the constitution adopted by a tribe shall vest in it the power "to prevent the sale, disposition, lease, or encumbrance of tribal lands, interests in lands, or other tribal assets without the consent of the tribe," 25 U.S.C. 476, and Article IV of the Tyonek Constitution contains such a provision. Even apart from the IRA, the power to prevent alienation of tribally-constructed housing would appear to fall squarely within the Village's "inherent power to determine tribal membership, to regulate domestic relations among members, and to prescribe rules of inheritance for members." *Montana* v. *United States*, 450 U.S. 544, 564 (1981). Ordinance No. 65-32 affects nonmembers only indirectly, to the extent that they seek to lease Family Plan units. *Montana* affirms that "[a] tribe may regulate * * * the activities of

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[13] Although petitioners assert (Pet. 27) that the Village officers exceeded their authority by excluding petitioners "because of their race," the ensuing discussion makes clear that the quoted phrase simply refers to the officers' enforcement of Ordinance No. 65-32 against them. As we have explained (see page 6, *supra*), the Ordinance restricts eligibility to lease Family Plan housing on the basis of membership in the Village, not race, and such distinctions are not prohibited racial classifications.

nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements." 450 U.S. at 565.

Alaska's contention (Amicus Br. 5) that ANCSA terminated the Village's authority to enforce the Family Plan ordinance is without support in the language or legislative history of that statute. There is no evidence in ANCSA of a general intent to terminate Indian self-government in Alaska. Even where Congress has enacted explicit termination legislation, the courts have found that Tribes retain residual power over matters such as membership and the regulation of remaining treaty rights. See *Kimball* v. *Callahan*, 590 F.2d 768, 775-776 (9th Cir.), cert. denied, 444 U.S. 826 (1979); *Menominee Tribe* v. *United States*, 388 F.2d 998 (Ct. Cl. 1967), aff'd, 391 U.S. 404 (1968).[14]

At bottom, moreover, petitioners' objection to the district court's derivative immunity ruling rests entirely on their disagreement with that court's interpretation of 25 U.S.C. 398b to authorize the Village to adopt Ordinance No. 65-32 in order to preserve housing built with funds derived from oil leasing for the benefit of tribal members. See Pet. 28-29. In our judgment, that narrow ruling, upheld by the court of appeals, does not warrant further review.

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[14] The State of Alaska incorrectly suggests that this case presents the question whether Native Villages may exercise "reservation-like governmental authority" (Amicus Br. 9) and whether the State's jurisdiction is limited by Villages' retained powers of self-government (Amicus Br. 8). The lower courts did not reach those broader issues; they resolved only the authority of the Village to restrict the alienability of housing originally built with trust funds. Pet. App. 33-35. The court of appeals remanded the eviction action, which, if the Village continues to rely on Rule No. 4, would eventually present the broader question of whether the "traditional and undisputed power [of tribes] to exclude persons whom they deem to be undesirable from tribal lands," *Duro* v. *Reina*, 110 S. Ct. at 2065, survives where the lands in question are no longer part of a reservation but have been transferred in fee to a for-profit corporation pursuant to ANCSA. Cf. *Organized Village of Kake* v. *Egan*, 369 U.S. 60 (1962). That question is not, however, involved here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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In The

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October Term, 1990

DONALD and ERNA PUCKETT;
FRED and VIRGINIA SLAWSON,

Petitioners,

v.

NATIVE VILLAGE OF TYONEK,

Respondent.

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CONTINGENT REQUEST FOR PLENARY REVIEW

Contingent on this Court's disposition of certain questions presented in Oklahoma Tax Commission v. The Citizen Band Potawatomi Indian Tribe of Oklahoma, No. 89-1322, and in Hoffman v. Native Village of Noatak, et al., No. 89-1782, the Native Village of Tyonek, respondent herein, respectfully submits this supplemental memorandum to request that the court grant the petition for a writ of certiorari herein and schedule the matter for plenary review unless the Court, regardless of the outcome in Oklahoma Tax Commission and Native Village of Noatak, determines to dismiss the petition for a writ of certiorari herein.

Oklahoma Tax Commission and Native Village of Noatak each raise issues in common with the issue s presented for

review here. Oklahoma Tax Commission presents for review two issues raised by the petitioners here. These are: (1) whether Indian tribes possess sovereign immunity from unconsented counterclaims, and (2) whether the lands governed by the tribe are "Indian country." Native Village of Noatak asks the Court to review whether the Native Villages of Noatak and Circle are recognized "Indian tribes." Here, petitioners have asked the Court to review whether the Native Village of Tyonek is a recognized "Indian tribe."

The Native Village of Tyonek's request that the Court schedule plenary review of the decisions below is made contingent on the Court ruling adversely to the Citizen Band Potawatomi Indian Tribe of Oklahoma or the Native Village of Noatak on any of

the issues identified above. In the event of such a ruling or rulings, the Native Village of Tyonek respectfully submits that a summary disposition in favor of the petitioners here, based on such ruling or rulings, would be inappropriate and unjustified.

While the Native Village of Tyonek agrees with the Native Villages of Noatak and Circle that Alaska Native villages, in general, are federally recognized Indian tribes, the Native Village of Tyonek does have a legal and factual history, fully developed in the record below, that is different in certain important respects from the histories of both Noatak and Circle and that strongly supports the conclusion that the Native Village of Tyonek is a recognized Indian tribe. The legal and factual history

pertaining to the Indian country status of the lands occupied by the Native Village of Tyonek is also fully developed in the record below. It is a history remarkably different from the history of the lands occupied by the Citizen Band Potawatomi Indian Tribe of Oklahoma. This history also strongly supports the conclusion that the lands occupied by the Native Village of Tyonek are Indian country.

With respect to the tribal sovereign immunity issue raised in Oklahoma Tax Commission, the Native Village of Tyonek supports the position of the Citizen Band Potawatomi Indian Tribe and the Solicitor General. However, should the Court rule that the Citizen Band Potawatomi Indian Tribe does not have sovereign immunity from the counterclaim of the Oklahoma Tax

Commission, the Native Village of Tyonek submits that there are critical differences between the governmental counterclaim in that case and the private counterclaim in the case at bar that would support tribal sovereign immunity from the counterclaims at issue here. Among these differences, for example, is the fact that in Oklahoma Tax Commission, the tribe asserted sovereign immunity from a counterclaim that the tribe's actions violated the governmental powers of the State of Oklahoma as established in prior decisions of this Court. Moreover, these powers have direct impact on the state treasury. The counterclaim does not implicate the basic sovereign powers of the tribe. Here, in contrast, the counterclaim directly challenges governmental actions of the Native

Village of Tyonek that were undertaken in the exercise of Tyonek's fundamental sovereign powers over tribal lands and over people. Unlike Oklahoma Tax Commission, upholding the sovereign immunity of the Native Village of Tyonek would not impinge on any powers of the State of Alaska or adversely affect the state treasury. Plenary review is necessary in order for these differences to be fairly considered before any tribal sovereign immunity ruling that may emerge from Oklahoma Tax Commission is applied to the Pucketts' and Slawsons' counterclaims against the Native Village of Tyonek.

For the foregoing reasons, the Native Village of Tyonek respectfully requests that, contingent on the Court ruling against the Native Villages of Noatak and

Circle on the tribal status issue or against the Citizen Band of Potawatomi Tribe of Indians on the tribal sovereign immunity question, the Court grant the petition for a writ of certiorari herein and schedule the matter for plenary review unless the Court determines, regardless of the occurrence of such contingency, to deny the petition for a writ of certiorari herein.

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Respectfully submitted,

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